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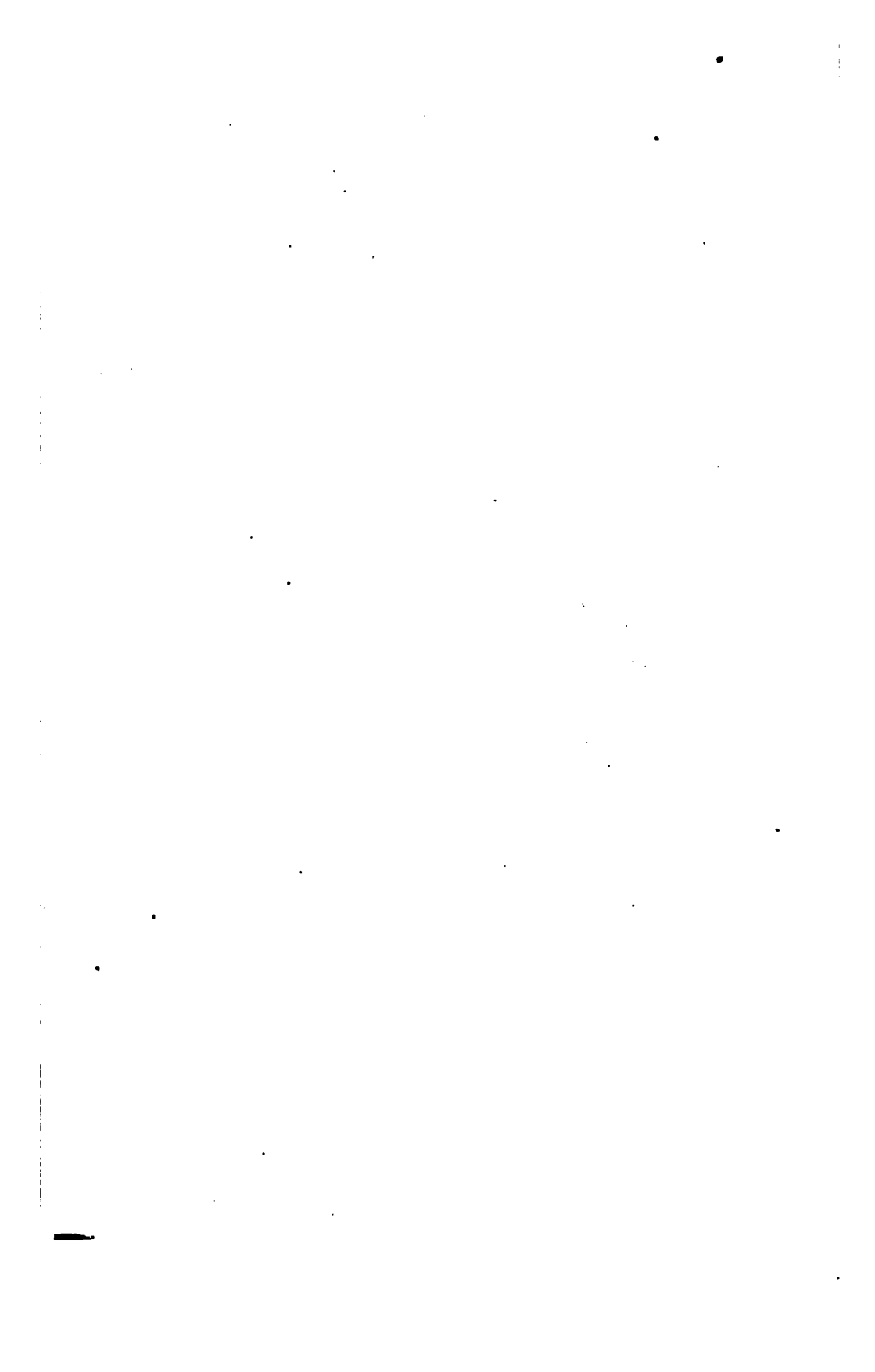


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REPORTS OF CASES
DETERMINED IN
THE SUPREME COURT
OF THE
STATE OF NEVADA,
DURING THE YEAR 1870.

REPORTED BY
ALFRED HELM, CLERK OF SUPREME COURT,
AND
THEODORE H. HITTELL, Esq.

VOLUME VI.

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HON. B. C. WHITMAN, }ASSOCIATE JUSTICES.

OFFICERS OF THE COURT.

HON. ROBERT M. CLARKE,†.....ATTORNEY GENERAL.

ALFRED HELM,.....CLERK.

*Term expired first Monday in January, A. D. 1871 — Hon. JOHN GARBER his successor.

†Term expired first Monday in January, 1871 succeeded by Hon. LUTHER A. BUCKNER.

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Sixth District.....	HON. JOHN H. BOALT.
Seventh District.....	HON. BENJ. CURLER.
Eighth District, Esmeralda County....	HON. J. G. McCLINTON.
Eighth District, White Pine County....	HON. WM. H. BEATTY.
Ninth District.....	HON. CHARLES A. LEAKE, deceased.
Ninth District.....	HON. JOHN D. GORIN, appointed.
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Second District.....	HON. C. N. HARRIS.
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Seventh District.....	HON. MORTIMER FULLER.
Eighth District.....	HON. WM. H. BEATTY.
Ninth District.....	HON. J. H. FLACK.

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R U L E S
OF
THE SUPREME COURT
OF
THE STATE OF NEVADA.

RULE I.

Applicants for license to practice as Attorneys and Counsellors will be examined in open Court on the first day of the term.

RULE II.

In all cases where an appeal has been perfected, and the statement settled (if there be one) twenty days before the commencement of a term, the transcript of the record shall be filed on or before the first day of such term.

RULE III.

If the transcript of the record be not filed within the time prescribed, the appeal may be dismissed on motion during the first week of the term, without notice. A cause so dismissed may be restored during the same term, upon good cause shown, on notice to the opposite party; and unless so restored, the dismissal shall be final and a bar to any other appeal from the same order or judgment.

RULE IV.

On such motion, there shall be presented the certificate of the Clerk below, under the seal of the Court, certifying the amount or character of the judgment, the date of its rendition, the fact and date of the filing of the notice of appeal, together with the fact and date of service thereof on the adverse party, and the character of the evidence by which said service appears, the fact and date of the filing the undertaking on appeal, and that the same is in due form, the fact and time of the settlement of the statement, if there be one ; and also, that the appellant has received a duly certified transcript, or that he has not requested the Clerk to certify to a correct transcript of the record ; or, if he has made such request, that he has not paid the fees therefor, if the same have been demanded.

RULE V.

All transcripts of records hereafter sent to this Court shall be on paper of uniform size, according to a sample to be furnished by the Clerk of the Court, with a blank margin one and a half inches wide at the top, bottom, and side of each page, and the pleadings, proceedings, and statements shall be chronologically arranged. The pages of the transcript shall be numbered, and shall be written only upon one side of the leaves. Each transcript shall be prefaced with an alphabetical index to its contents, specifying the page of each separate paper, order, or proceeding, and of the testimony of each witness, and shall have, at least, one blank or fly-sheet cover.

Marginal notes of each separate paper, order, or proceeding, and of the testimony of each witness, shall be made throughout the transcript.

The transcript shall be fastened together on the left side of the pages, by ribbon or tape, so that the same may be secured, and every part conveniently read.

The transcript shall be written in a fair, legible hand, and each paper or order shall be separately inserted.

RULE VI.

No record which fails to conform to these rules shall be received or filed by the Clerk of the Court.

RULE VII.

For the purpose of correcting any error or defect in the transcript from the Court below, either party may suggest the same, in writing, to this Court, and upon good cause shown, obtain an order that the proper Clerk certify to the whole or a part of the record, as may be required. If the Attorney of the adverse party be absent, or the fact of the alleged error or defect be disputed, the suggestion must be accompanied by an affidavit showing the existence of the error or defect alleged.

RULE VIII.

Exceptions to the transcript, statement, the undertaking on appeal, notice of appeal, or to its service, or proof of service, or any technical objection to the record affecting the right of the appellant to be heard on the points of error assigned, must be taken at the first term after the transcript is filed, and must be noted in writing and filed at least one day before the argument, or they will not be regarded. In such cases, the objection must be presented to the Court before the argument on its merits.

RULE IX.

Upon the death or other disability of a party pending an appeal, his representative shall be substituted in the suit by suggestion, in writing, to the Court on the part of such representative or any party on the record. Upon the entry of such suggestion, an order of substitution shall be made, and the cause shall proceed as in other cases.

RULE X.

The calendar of each term shall consist only of those causes in which the transcript shall have been filed on or before the first day of the term, unless by written consent of the parties: *provided*, that all cases in which the appeal is perfected, and the statement settled, as provided in Rule II, and the transcript is not filed before the first day of the term, may be placed on the calendar, on motion of the respondent, upon the filing of the transcript.

RULE XI.

Causes from the same judicial district shall be placed together, and all the causes shall be set on the calendar in the order of the several districts, commencing with the first, except that causes in which the people of the State are a party shall be placed at the head of the calendar.

RULE XII.

At least three days before the argument, the appellant shall furnish to the respondent a copy of his points and citation of authorities; and within two days thereafter, the respondent shall furnish to the appellant a copy of his points and citation of authorities, and each shall file with the Clerk a copy of his own for each of the Justices of the Court, or may, one day before the argument, file the same with the Clerk, who shall make such copies, and may tax his fees for the same in his bill of costs.

RULE XIII.

No more than two counsel on a side will be heard upon the argument, except by special permission of the Court; but each defendant who has appeared separately in the Court below may be heard through his own counsel. The counsel for the appellant shall be entitled to open and close the argument.

RULE XIV.

All opinions delivered by the Court, after having been finally corrected, shall be recorded by the Clerk.

RULE XV.

All motions for a rehearing shall be upon petition in writing, presented within ten days after the final judgment is rendered, or order made by the Court, and publication of its opinion and decision, and no argument will be heard thereon. No remittitur or mandate of the Court below shall be issued until the expiration of the ten days herein provided, and decision upon the petition, unless upon good cause shown, and upon notice to the other party, or by written consent of the parties, filed with the Clerk.

RULE XVI.

Where a judgment is reversed or modified, a certified copy of the opinion in the case shall be transmitted, with the remittitur, to the Court below.

RULE XVII.

No paper shall be taken from the Court-room or Clerk's office, except by order of the Court, or of one of the Justices. No order will be made for leave to withdraw a transcript for examination, except upon written consent to be filed with the Clerk.

RULE XVIII.

No writ of error or *certiorari* shall be issued, except upon order of the Court, upon petition, showing a proper case for issuing the same.

RULE XIX.

Where a writ of error is issued, upon filing the same and a sufficient bond or undertaking with the Clerk of the Court below, and upon giving notice thereof to the opposite party or his Attorney, and to the Sheriff, it shall operate as a supersedeas. The bond or undertaking shall be substantially the same as required in cases on appeal.

RULE XX.

The writ of error shall be returnable within thirty days, unless otherwise specially directed.

RULE XXI.

The rules and practice of this Court respecting appeals shall apply, so far as the same may be applicable, to proceedings upon a writ of error.

RULE XXII.

The writ shall not be allowed after the lapse of one year from the date of the judgment, order, or decree, which is sought to be reviewed, except under special circumstances.

RULE XXIII.

Appeals from orders granting or denying a change of venue, or any other interlocutory order made before trial, will be heard at any regular or adjourned term, upon three days' notice being given by either appellant or respondent, when the parties live within twenty miles of Carson. Where the party served resides more than twenty miles from Carson, an additional day's notice will be required for each forty miles, or fraction of forty miles, from Carson.

REPORTS OF CASES
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF NEVADA,
APRIL TERM, 1870.

ADAM GERHAUSER, RESPONDENT, *v.* THE NORTH BRITISH AND MERCANTILE INSURANCE COMPANY,
APPELLANT.

CONDITION INDORSED ON INSURANCE POLICY. Where a condition indorsed on a policy of insurance provided that in case the insured committed fraud in the claim made for a loss, or made a false declaration or affirmation in support thereof, he should forfeit all benefit under the policy, and under any other policy granted him by the company on other property: *Held*, that such condition was to be construed as an express part of the contract.

INSURANCE—FRAUD—QUESTIONS OF LAW AND FACT. Where a contract of insurance provided that fraud in a claim made under it for a loss, or a false declaration or affirmation in support thereof, should forfeit all benefit under the policy: *Held*, that whether there was such fraud, or false declaration or affirmation, was a matter for the jury to decide under proper instructions of the Court.

MODIFICATION OF INSTRUCTIONS. In a suit on two policies of insurance, an instruction was asked to the effect that if the jury found that insured, in giving an account of his loss as required by a condition indorsed on the second policy, was guilty of fraud (which fraud was to forfeit all benefit under both policies) they should find for defendant; and the Court modified the instruction by striking out "you must find for defendant," and substituting "the policy can for that reason be vitiated": *Held*, that the modification was error, as it

Gerhauser v. The North British and Mercantile Insurance Co.

destroyed the force of a correct instruction, rendered vague what before was clear, and confined the effect of a violation of the condition to one policy alone.

- **APPEAL** from the District Court of the First Judicial District, Storey County.

The policies of insurance upon which suit was brought were issued in March, 1868, upon a brick building in Virginia City and certain furniture, bedding and merchandise. A fire occurred in November, 1868, by which the building and merchandise were totally destroyed, and the furniture and bedding damaged and in part destroyed. Other facts are stated in the opinion.

Williams & Bixler, for Appellant.

I. In making a statement of his losses, as provided in the eleventh subdivision of the conditions indorsed on the policies sued on, the plaintiff was guilty of fraud in the claim made for his loss, and also of false declaring in support thereof. (*Levy v. Bailie*, 7 Bing. 349; 3 Greenleaf on Ev., Secs. 13 and 14.)

II. The Court erred in modifying plaintiff's instruction by striking out the words "you must find for the defendant," and inserting in lieu thereof "the policy can be for that reason vitiated." The body of the instruction as offered followed the language of the eleventh condition indorsed on the policy, and was therefore correct that far. If plaintiff had been guilty of fraud in making his claim, or false swearing in support of it, the jury were bound to find for the defendant. Yet the Court refused so to instruct them. Further, the modification confined the consequences of the fraud, or false swearing, to the policy with reference to which it was made, while the contract of the parties extended them to all policies issued by the defendant. The instruction should have been given as asked. It was clear, unmistakable language, and the Court had no right to change it into uncertain and doubtful terms.

III. Defendant's last instruction was in the language of the contract, and was therefore correct. It is no answer to say that the falsehood should have been material, to have warranted the finding

Gerhauser v. The North British and Mercantile Insurance Co.

for the defendant. The contract of the parties should be enforced, and the Court had no power by construction to add to, or take from it. (*Kate Healey v. Imperial Co.*, 5 Nev. 268; 13 Maine, 265.)

H. K. Mitchell and Aldrich & De Long, for Respondents.

I. The statement of plaintiff in respect to the occurrence of the fire, and of his losses, was made at the suggestion, and under the direction of the agents of the company, who were sent up to adjust the loss. The only ground upon which it is attacked is, that too high an estimate was placed on the furniture, beds and bedding. It would be strange if such a construction should be placed on condition eleven indorsed on the policy. The true rule is, that any misstatement or false declaration in a material matter, made with intent to defraud, shall deprive the party making it of the benefit of the policy. The plaintiff stated the value to be \$6,000, the jury found it \$3,000; but the Court will notice that plaintiff qualifies his statement of the value, by the statement that the furniture, etc., including the bar fixtures and furniture of the saloon, had cost that sum, (\$6,000) within the last four years. This qualification shows what his idea of value was, and that no fraud was intended. (*Moore v. Protection Ins. Co.*, 16 Shipley, 97; Angell on Fire Ins., 316, Sec. 260.)

II. The instructions asked for by defendant were based entirely upon the doctrine that misrepresentation on the part of plaintiff at the time of procuring the policies sued on, or false declaring on his part at the time of making the claim for his loss, absolutely renders void the policies. We contend for a different doctrine, which justifies the refusal and modification of those instructions.

By the Court, WHITMAN, J. :

Respondent brought his action to recover from appellant the sum of twelve thousand dollars, losses by fire, upon two policies of insurance made by appellant to him; one for five thousand dollars, upon his so-called brick building; the other for seven thousand dollars, apportioned, five thousand dollars upon his household furni-

Gerhauser v. The North British and Mercantile Insurance Co.

ture, beds and bedding, and two thousand dollars upon his stock of merchandise, all in such building.

One of the issues raised by the answer was, that respondent had violated the provisions of condition eleven of the policy last named, in that he falsely and fraudulently swore, in his notice of loss, to a value much greater than the real value of the household furniture, beds and bedding. The trial resulted in a general verdict for respondent for ten thousand dollars; the jury specially finding the value of the property abovenamed at three thousand dollars. A motion for new trial was denied, and from the order and the judgment appeal is taken.

Various errors are assigned, but the only one material to notice is the refusal of the District Court to give the instructions asked by appellant, touching the issue referred to. It appeared in evidence, that in his sworn statement of losses respondent placed the value of the household furniture, beds and bedding at six thousand dollars. In his testimony upon the trial he fixed it at about forty-five hundred dollars. There was evidence tending to greatly reduce this estimate. Appellant, thereupon, asked the following instructions:

1st. "If you believe from the evidence that plaintiff made and delivered to the defendant, or its agents, an account of his loss or damage, as required and provided in the eleventh condition indorsed on the second policy of insurance attached to the complaint, and made proof of said account by his declaration or affirmation, and you find that there was fraud in the claim made by plaintiff for such loss, or that he was guilty of false declaring or affirming in support thereof, you must find for the defendant."

2d. "If you believe from the evidence that plaintiff made the proof by his declaration or affirmation, as required in the eleventh condition indorsed on his second policy in his complaint described, and that such declaration or affirmation was false, you will find for the defendant."

The first of these instructions was given with this modification, striking out the words at the end thereof, "you must find for the defendant," and inserting in lieu, "the policy can for that reason be vitated." The second instruction quoted was refused.

Gerhauser v. The North British and Mercantile Insurance Co.

The eleventh condition referred to, reads as follows:

11. "All persons insured by this company, sustaining any loss or damage by fire, are immediately to give notice to the company or its agents, and within fourteen days after such loss or damage has occurred, are to deliver in as particular an account of their loss or damage as the nature of the case will admit of, and make proof of the same by their declaration or affirmation, and produce such other evidence as the directors of this company or its agents may reasonably require; and until such declaration or affirmation, account and evidence are produced, the amount of such loss or any part thereof shall not be payable or recoverable; and if there should be fraud in the claim made for such loss, or false declaring or affirming in support thereof, the claimant shall forfeit all benefit under this policy; and any other policy granted to the insured by this company on any other property will be also null and void. I no claim be made within three months after the fire, the claimant shall forfeit all rights under this policy."

This is one of the conditions upon which the policy was granted, and is to be construed as a part thereof. If its terms have been violated, then by express agreement both policies in suit became null and void. Whether there was such violation, was a matter for the jury to decide under proper instructions. Those offered by appellant were correct, and should have been given.

The modification of the first entirely destroyed its force. It rendered that vague which before was clear; and if taken literally, was erroneous, in that it confined the effect of a violation of the condition to the second policy; when, such violation being found, it would affect equally both contracts, by virtue of the express terms of such condition. The refusal to give these instructions was error, entitling appellant to a new trial. The order denying the same is reversed, and the cause remanded.

By JOHNSON, J., specially concurring:

I agree in the opinion that the District Court erred in the particular matter of modifying the instruction as above shown, and therefore concur in the order reversing the judgment; but in view

White v. White.

of the probability of a re-trial of the cause, am not satisfied to give indorsement to the correctness of the two instructions above quoted, in the naked form they were offered, which necessarily would be the effect of a general concurrence in the views expressed in the leading opinion.

It is undoubtedly correct to say that the words therein used, "false," "false declaring or affirming," but follow the language contained in the policies, and hence of the contracts between the parties; yet the Court should accompany the instructions with a proper explanation of their legal effect and meaning, so that the jury might not be misled thereby. For it must be conceded, that although the insured makes a sworn exhibit of his losses, as perhaps is the fact in this case, largely in excess of the value, as shown by the weight of evidence, yet if it result from a mere error of judgment in estimating values—is not done with the design and intent to deceive the insurer as to the extent of such losses—it works no forfeiture under the terms of the contract of insurance. (Angel on Life and Fire Insurance, Sec. 260; *Levy v. Baillie*, 7 Bing. R. 349.) And these are facts peculiarly within the province of a jury. Hence the Court, in its instructions, should be extremely cautious in preserving the distinction which is taken between a statement which may in point of fact not be true, yet in legal contemplation is not "false," which distinction may not at all times occur to jurors in the absence of explanation.

**EVALINE A. WHITE, RESPONDENT, v. ALFRED G. WHITE,
APPELLANT.**

APPEAL—WANT OF AUTHENTICATION OF STATEMENT ON NEW TRIAL. Papers purporting to be a statement and affidavits on motion for a new trial, if they are not authenticated or identified in the manner provided by statute, (Stats. 1869, 226) cannot be considered in the Supreme Court, and should be stricken out on motion made therefor.

AUTHENTICATION OF STATEMENT ON NEW TRIAL. Where a statement on motion for new trial is not authenticated in the mode prescribed by statute, it is a good ground for denying the motion.

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PRESUMPTION AGAINST WAIVER OF ERRORS. It is always the duty of the person wishing to avoid the consequences of error in legal proceedings, upon the ground of waiver by the opposite party, to show such waiver, and not of the person insisting on the error to establish that it was not waived.

ISSUES ON APPEAL FROM NEW TRIAL ORDER. The purpose of the legislative provisions in relation to appeals from orders on motions for new trials, is to allow all points which could be urged in the Court below, either for or against the motion for new trial, to be raised on the appeal from the order granting or refusing it, without any further statement.

NAMING A PAPER NOT INDORSING ITS CORRECTNESS AS SUCH. A stipulation reciting the papers by name which the transcript on appeal should contain, and among others the "Statement on New Trial," is not a waiver of objections that the paper purporting to be such statement is not properly authenticated, and therefore not a statement.

APPEAL from the District Court of the Second Judicial District, Douglas County.

The action was for divorce. Judgment was rendered November 23d, 1869, in favor of the plaintiff for a dissolution of the marriage, for one-half of the common property, and for costs. A notice of motion for new trial was served on November 24th, 1869, and a proposed statement filed on December 1st, 1869. On March 1st, 1870, the motion for new trial was denied, on the ground in part that there was no properly authenticated statement, it being neither settled, nor agreed to, nor containing any certificate of the clerk that no amendments had been filed. On April 4th, 1870, after the denial of the motion for a new trial, the clerk of the Court below attached a certificate to the paper to the effect that no amendments had ever been proposed to it or filed.

The defendant having appealed, the plaintiff moved to strike out from the transcript on appeal the papers purporting to be a statement on motion for new trial.

T. W. W. Davies, for the Motion.

I. In order for a statement to be considered by the appellate Court, it must be authenticated as required by law. When agreed to by parties, it must be accompanied with the certificate of agreement; when not agreed to, and submitted to the Court for settlement, it must be accompanied with the Judge's certificate of settle-

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ment; if not amended in the time allowed, it must be accompanied with the certificate of the clerk that no amendments to the statement have been proposed, in order to show that the proposed statement has been impliedly agreed to.

II. It is urged that it is too late for us to object to the so-called statement, after arguing motion for new trial in the Court below. This view is untenable; and the more especially so as we urged, in the Court below, that the motion for new trial should be denied on the ground (among others) that the record called a statement was radically defective, being in no wise authenticated. (*Lockwood v. Marsh*, 3 Nev. 138; *Cosgrove v. Johnson*, 30 Cal. 509; *Vilhac v. Biven*, 28 Cal. 409; *Kimball v. Semple*, 31 Cal. 657; *Doyle v. Seawell*, 12 Cal. 425; *Fee v. Starr & Grimshaw*, 13 Cal. 170; *Kavanaugh v. Maus*, 28 Cal. 261.)

III. In signing a stipulation that the transcript on appeal shall consist of certain papers, we do not waive our right to object to such papers being considered by the appellate Court. (*Cosgrove v. Johnson*, 30 Cal. 509; *Wall v. Preston*, 25 Cal. 59.)

IV. In the absence of an authenticated statement, or of a stipulation showing what papers were read or referred to on the hearing of the motion for a new trial below, there is nothing to identify the "affidavits" as having been read or referred to on the hearing of the motion. As to identification, the same may be said of the "minutes of the Court." (Practice Act, Sec. 197; *Gordon v. Clark*, 22 Cal. 533; *Paine v. Linhill*, 10 Cal. 370; *Stone v. Stone*, 17 Cal. 513.)

V. An authenticated record *purporting* to be a statement on motion for a new trial, may be stricken from the transcript on appeal, on motion. (*Kimball v. Semple*, 31 Cal. 657.)

R. M. Clarke, against the Motion.

I. Upon the hearing of the motion below, no point or suggestion was made that the statement was not properly authenticated. The motion was set down for argument in open Court, argued upon the merits by counsel for both parties, and taken under advisement by

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the Court, without reference to the absence of the clerk's certificate. It would be pressing presumption into absurdity and reason into folly, to hold the absence of the certificate at the submission of the motion fatal to appellant's case. The law will not permit a party to remain silent respecting a curable technical objection, until the defect is no longer remediable, and then avail himself of it. Nor will it permit a Court to cover gross and material error occurring at the trial, by assigning as reason for denying a new trial an objection that the record has not the clerk's certificate appended, when a suggestion of that fact, made upon the argument, must have resulted in removing the objection, and silencing the reason. The rule is universal, that a defect that can be supplied must be taken advantage of before opportunity has passed, or it will be waived.

II. The Practice Act provides that "where no amendments have been filed, the statement shall be accompanied with the certificate of the clerk of that fact." Under this provision, we submit the certificate need not be appended or attached to the statement. If made in proper time, and of record, it is sufficient. It need not be appended to the statement, as it has no material office to perform below; it certifies a negative fact merely, which fact already appears, or rather, may be ascertained from inspecting the records. It performs no material office until it reaches this Court, and as the time when it shall be made is not prescribed, can it be ground for denying a motion for new trial, that it was not made before it could be of material purpose? The law abhors absurdities.

III. We think it clear that the clerk's certificate is for the information of this Court, and may be appended at any time; that, if otherwise, the omission is cured by the appearance and stipulation of parties. (*Dickinson v. Van Horn*, 9 Cal. 207; *Millard v. Halloway*, 2 Cal. 119; 28 Cal. 194; *Connor v. Morris*, 23 Cal. 447; *Redman v. Yountz*, 5 Cal. 148; *Gordon v. Clarke*, 22 Cal. 533.)

By the Court, WHITMAN, J.:

This appeal is from the order of the District Court denying appellant's motion for a new trial, and from the final judgment against

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him. A preliminary motion was made upon the hearing in this Court by respondent, to strike from the transcript the papers purporting to be a statement, affidavits used on motion for new trial, and minutes of the Court; because there is no authentication or identification, as by statute provided, of all or any such papers.

The statute regulating motions for new trials provides for three cases touching statements, as follows: * * "When the statement is agreed to, it shall be accompanied with the certificate either of the parties themselves in fact, or their attorney, that the same has been agreed upon and is correct. When settled by the Judge or referee, it shall be accompanied with his certificate, that the same has been allowed by him, and is correct. When no amendments have been filed, the statement shall be accompanied with the certificate of the clerk of that fact." The so-called statement in this transcript falls within neither of these categories.

With regard to affidavits used on motion for new trials, the statute provides: "To identify the affidavits, it shall be sufficient for the Judge or clerk to indorse them at the time, as having been read or referred to on the hearing." None of the affidavits copied in this transcript are so, or otherwise, indorsed.

With regard to the minutes of the Court used on motions for new trial, the statute provides: "To identify any * * * minutes of the Court read or referred to on the hearing, it shall be sufficient that the Judge designate them as having been read or referred to in his certificate, to be for that purpose by him made thereon." Here, there is no such certificate of identification.

The statute further provides that "the affidavits and counter-affidavits, or the statement thus used, (on motion for new trial) in connection with such pleadings, depositions, documentary evidence on file, testimony taken by a reporter, and minutes of the Court, as are read or referred to on the hearing, shall constitute without further statement the papers to be used on appeal from the order granting or refusing the new trial." (Statutes of 1869, 226, Sec. 197.) The papers under discussion may have been so used, but as the statement does not appear in any manner authenticated, nor the other papers in any wise identified as by statute provided, they cannot be considered by this Court, and should be stricken out on

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the motion made, unless there be some further or other reason why they should be retained and considered, as urged by appellant.

He says that this objection comes too late ; that the defects being such as could have been readily cured by suggestion in the District Court, attention should have been called to them there ; and that by reason of neglect to do so, and the submission of the motion on its merits, and a stipulation as to the contents of the transcript which will be noticed hereafter, respondent should be deemed to have waived her objection.

The answer to all that portion of the argument, save as to the stipulation, is given upon a similar point by this Court, in the following language : " It is argued by the respondent that as no objection to a consideration of the statement was made in the Court below, the appellant must be deemed to have waived it, and therefore it cannot be raised in this Court. But in answer to this it may be said, it does not appear from the record here whether any such objection was interposed in the Court below or not, nor indeed could it be brought to the attention of this Court upon an appeal of this kind. The section already referred to declares that " the affidavits and counter-affidavits," etc., (quoted as above).

" Upon an appeal then, from such order, any objection or motion which might be made by the opposing party, respecting the record, could not be brought to this Court. This informality or defect in the statement is undoubtedly a good ground for denying the motion. Had the Court discovered it before the order was made, it could have placed its denial upon the sole ground that there was no such statement before it as could legally be considered. The only ground then, upon which it can be claimed that this objection cannot be raised in this Court is, that it was waived by the appellant in the Court below. There is, however, nothing in the record before us to warrant the conclusion that it was waived. For aught that appears here, the objection was made at the proper time. It will not be claimed that it is incumbent on the appellant here, to show that he did not waive the objection. It is always the duty of the person wishing to avoid the consequence of error in legal proceedings, upon the ground of waiver by the opposite party, to show such waiver, and not upon the person insisting on it to establish the

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negative. * * * If the appellant in any way waived his right to insist upon such error, it is the duty of the respondent to show such waiver; otherwise, it is available here, as in the Court below. * * *

“Again, we know of no way by which an objection to the statement, or a motion to strike it out, could be brought to the attention of this Court, except by a separate statement on appeal; and it is very doubtful whether it could be brought here, even in that way. But admitting that it can, we think it quite clear such a course was never intended to be required by the Legislature. The purpose evidently was to allow all points which could be urged in the Court below, either for or against the motion for new trial, to be raised on the appeal from the order granting or refusing it, without any further statement; otherwise, why are the statements and papers used on such motion made the record upon which the order is to be reviewed in the appellate Court? And why, as appears to be the case, is this Court confined to an investigation of the statement and papers used on such motion? It is certain that no objection to the statement, or motion to strike it out, would come to this Court, under the provisions of section one hundred and ninety-seven of the Act already quoted, upon a mere appeal from the order. As a consequence, it either could not be brought here at all, or it must be presented in a separate statement, setting forth the fact that such objection or motion was made; a practice which seems to be utterly unauthorized, and evidently not contemplated by the Legislature. And if not authorized, then the appellant would be entirely deprived of any advantage from such objection or motion, even if it were made, because he would be entirely unable to present it to the Court.” * * * (*Mc Williams v. Hirshman*, 5 Nev. 263.)

This case falls within the rule just quoted, unless its situation is changed by virtue of the stipulation referred to. Here it is: “The transcript on appeal shall contain, 1st. Complaint; 2d. Answer; 3d. Findings; 4th. Judgment; 5th. Notice of Motion for New Trial; 6th. Stipulation for time to file Statement on Motion for New Trial; 7th. Statement on New Trial; 8th. Instructions of the Court; 9th. Order denying Motion for New Trial,

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with the reasons of the Court for denying such motion; 10th. All Minutes of the Court; 11th. All other papers required by law to be certified upon appeal; 12th. Notice of Appeal; 13th. Undertaking on Appeal." It is nothing but a mere formal recital for the assistance of the clerk in making up the transcript, and in no wise indorses the correctness of any of the papers specified.

The motion of appellant must, therefore, be granted. Then the appeal stands from the final judgment, upon the judgment roll. It is not claimed, nor is it the fact, that any error appears therein. Therefore, the judgment of the District Court is affirmed.

JOHNSON, J., did not participate in the foregoing decision.

LAWRENCE GILMAN *et al.*, APPELLANTS, v. THE COUNTY OF DOUGLAS, RESPONDENT.

PAYMENT OF GOLD COIN WARRANTS IN TREASURY NOTES. Where the holders of county warrants calling for gold coin accepted treasury notes for them, though protesting against payment in that currency, and surrendered the warrants: *Held*, that they could not afterwards recover the difference in value between the treasury notes and coin.

ACCEPTANCE OF TREASURY NOTES ON GOLD COIN CONTRACTS. If a creditor accepts treasury notes at par, in payment of a contract calling for coin, it is a complete satisfaction of the debt; and no action can, after the acceptance of such money, be maintained to recover the difference in value between it and coin.

ESTOPPEL—ACCEPTANCE OF PERFORMANCE OF CONTRACT. The acceptance of a performance differing from that contracted for, will estop the party so accepting, from afterwards taking advantage of the failure to perform in accordance with the contract.

RECEIVING PAYMENT IN TREASURY NOTES UNDER PROTEST. When a person entitled to be paid in coin receives payment in treasury notes, though at the same time protesting against payment in that kind of currency, he cannot retain such notes at a value not assented to by the other party, nor recover the difference in value between them and coin.

PROTESTING BY WORDS AND CONSENTING BY ACTS. A protest by a person against receiving payment in treasury notes, at the same time that he does receive them, places him in no better position than if nothing had been said, for the reason that, though he protests with his tongue, he consents by his acts.

APPEAL from the District Court of the Second Judicial District, Douglas County.

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The facts are stated in the opinion of the Court. The plaintiffs were Lawrence Gilman and Rufus Adams.

Clayton & Davies, for Appellants.

Clarke & Wells, for Respondent.

By the Court, LEWIS, C. J. :

In the year 1865, the plaintiffs entered into a contract with the proper authorities of Douglas County to erect a court house, for the sum of eighteen thousand five hundred dollars, to be paid in gold or silver coin of the United States. The building was completed in accordance with agreement, accepted by the county, and warrants upon the building fund were duly issued to the plaintiffs for the full sum due them, several of which were paid in coin. About half the entire amount, however, was paid in treasury notes, the plaintiffs protesting against payment in that currency, but accepting the money and surrendering their warrants.

This action is now brought to recover the sum of four thousand dollars, claimed to be the difference between the value of the treasury notes paid, and gold or silver coin, which the contract called for. The question is raised upon general demurrer, whether upon these facts the plaintiffs are entitled to recover. The Court below held not, and our conclusion is, the decision is correct. That in the market there is a difference in value between treasury notes and gold and silver, and in all cases where the Act of Congress has not ordained otherwise the Courts will, in enforcing the rights of contracting parties, recognize that difference, are propositions which need in no wise be questioned in this case; nor will it be denied by counsel for appellants, that for the discharge of debts, where the parties have not stipulated for payment in any particular kind of money, dollars in treasury notes are the equivalent of dollars in gold or silver. Where the parties to a contract have designated the kind of money to be paid, this Court has held that such contract may be specifically enforced by a judgment in the kind of dollars agreed to be paid; without, however, holding that even in such case, a dollar in treasury notes is not equal to a dollar in coin,

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but simply that the contract between parties in such cases may be enforced according to its letter. But where parties make no distinction between the different currencies, the Courts are compelled to treat them as equal for the payment of all private debts. Hence, if nothing were said between the parties in this case as to the kind of money to be paid, a payment of the stipulated sum in greenbacks would unquestionably be held a complete satisfaction of the contract, and no action could, after the acceptance of such money, be maintained to recover the difference in value between it and any other kind of money. Is the case different when, as in this case, the creditor accepts treasury notes at par, in payment of a contract calling for coin? We think not. As already stated, all debts may be discharged in treasury notes, at their par value, where the parties have not contracted for a different currency. Where the difference in principle, if they contract for the payment of one kind, but the creditor afterwards accepts the other, the debtor tendering it as the equivalent of the currency agreed to be paid? In the first case the equality of the currencies is acknowledged at the time of entering into the contract; in the latter, when the depreciated money is accepted in the execution of it.

As the right to recover coin, in payment of a debt, depends entirely upon the action and contract of the parties, the creditor who accepts treasury notes, at their par value, in payment of a debt payable in coin, is precisely in the same position as if he had not contracted for coin in the first instance. The defendant tendered treasury notes in satisfaction of the warrants which were surrendered, and thus the contract between the parties was completely executed. Not, it is true, according to its letter or spirit; but the plaintiffs accepted a performance by the defendant, different in character from what the contract called for. Was not this a complete waiver of their right to subsequently claim damages for the failure to perform, in accordance with the contract? This is not like the case of an acceptance of a part of a debt in satisfaction of the whole. In that case it might be said there was no consideration for the agreement to relinquish what remained; and therefore the balance might be recovered, notwithstanding the agreement to the contrary. But here the law made gold and treasury notes the equivalent for

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the payment of this debt, unless the parties stipulated otherwise. They did at first so stipulate, and the payment might have been enforced in gold ; but the subsequent acceptance of treasury notes, the defendant tendering them in satisfaction of the contract, places the plaintiffs in a position that they are estopped to deny that the contract was fully complied with. We take it to be law that the acceptance of a performance, differing from that contracted for, will estop the party so accepting from afterwards taking advantage of the failure to perform in accordance with the contract. Such is the position occupied by the plaintiffs.

The defendant did not agree that the notes should be taken at their actual value in the market, but tendered them in full satisfaction of the claim against it. Upon what principle then, can it be held that the plaintiffs could accept, and retain them at a value not assented to by the defendant, and recover the difference in value between them and gold ? If the plaintiffs did not deem the payment in treasury notes a fulfillment of the contract, it was then their duty to reject them entirely and seek their remedy, if any they had, on the contract. That they protested against payment in paper, places them in no better position than if nothing had been said by them, as they afterwards voluntarily accepted it. They protested with the tongue, but assented by their acts.

Judgment affirmed.

JOHNSON, J., did not participate in the foregoing decision.

HUMBOLDT COUNTY v. THE COUNTY COMMISSIONERS OF CHURCHILL COUNTY.

CONSTITUTIONAL CONSTRUCTION—DEBT OF CHURCHILL TO HUMBOLDT COUNTY. The second section of the amendatory Act of 1869, concerning counties, providing for the payment of \$3,000 a year for five years by Churchill County to Humboldt County, (Stats. 1869, 88) does not conflict with Art. IV, Sec. 17, of the Constitution, which prohibits a statute from embracing more than one subject and matters properly connected therewith, which shall be expressed in the title thereof.

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TITLE OF STATUTE WHAT TO EXPRESS. It is only necessary, under the constitutional provision as to the subject-matter and title of statutes, (Const., Art. IV, Sec. 17) to express in the title the principal subject embodied in the law, while the matters properly connected therewith are not required to be mentioned.

PRESUMPTION OF CONSTITUTIONALITY OF STATUTES. No statute will be annulled by a Court on the ground of unconstitutionality unless it be clearly in conflict with the Constitution.

STATUTORY CONSTRUCTION—IMPAIRING CONTRACTS. The statute of 1869, providing for the payment of \$3,000 a year for five years by Churchill County to Humboldt County, (Stats. 1869, 88) does not interfere with warrants drawn upon the treasury of Churchill County and registered at the date of its passage, and is not for any such reason open to the objection of impairing the obligation of contracts.

EFFECT OF AUDITING AND ALLOWING A CLAIM AGAINST A COUNTY. The auditing and allowing of a claim against a county gives the holder thereof no lien upon or right to any money in the treasury, or which may come into it; it is only the order or warrant of the auditor which gives that right.

SPECIFIC APPROPRIATION OF COUNTY REVENUES. The payment of all ordinary claims against a county is subject to any specific appropriation and setting apart of the county revenues for any designated purpose, unless such appropriation interfere with some prior vested right to the revenue.

LEGISLATIVE POWER—PREFERRING CLAIMS. The Legislature undoubtedly has the power to direct that certain claims against a county shall have a preference over all others which are not so situated as to give the holder a vested right to money in or to come into the treasury.

RIGHTS OF COUNTY OFFICERS TO COUNTY REVENUE FOR SALARIES. The county officers of Churchill County had no such vested right to the money in the treasury for the payment of their salaries, as to prevent the operation upon such money of the Act of 1869, (Stats. 1869, 88) providing for the payment of certain money yearly by Churchill to Humboldt County.

DUTIES OF COUNTY COMMISSIONERS—DISCRETION. Under the Act providing for the payment of \$3,000 a year for five years by Churchill to Humboldt County, (Stats. 1869, 88) the county commissioners of Churchill County had no discretion respecting the appropriation of the money.

MANDAMUS—COMMAND OF WRIT. Where a discretion is to be exercised by an officer as to the manner in which an act may be done, or the act depends upon his judgment, a writ of mandate directed to him will not control his discretion, but only command him to act without in any way interfering with the manner of his action; but where, on the contrary, a specific act is required to be done and no discretion given, the writ may command the doing of the very act itself.

MANDAMUS—PREVIOUS DEMAND WHEN NECESSARY. When the performance of the duty sought to be enforced by mandamus is of a character that could not be expected to be performed until demanded, the writ should not issue until demand made; but when the law unconditionally requires the doing of the specified act, no demand is necessary.

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MANDAMUS—OMISSION OF DUTY BY COUNTY COMMISSIONERS. Where county commissioners were by statute absolutely required to set apart certain funds in the treasury for a specific purpose, and refused or neglected to do so: *Held*, that mandamus was the only plain, speedy and adequate remedy to compel them to do their duty.

JUDICIAL POWER AS TO STATUTES. No Court has a right to annul or set aside a statute except upon constitutional grounds, and no inquiry can be made as to any alleged misunderstanding between legislators respecting its adoption, or even fraud in procuring its passage.

STATUTES THE EXPRESSION OF FREE LEGISLATIVE WILL. A statute must be taken by Courts to be the expression of the free will and wish of the Legislature, whatever may have been the means employed to secure its adoption, and irrespective of any agreement or understanding had between members.

This was an original application made in the Supreme Court for a writ of mandamus. It was made in behalf of Humboldt County against J. M. Sanford, James S. Gregory and J. S. Hall, county commissioners of Churchill County. In response to the petition, which was filed February 21, 1870, an alternative writ was issued, to which the defendants made answer, tendering the various issues decided in the case, and also setting up that there was an understanding and agreement between Churchill and Humboldt counties, upon which the statute of 1869, referred to in the opinion, was predicated. This agreement was to the effect that, if forty-three miles of the Central Pacific Railroad track were transferred from Humboldt to Churchill County, by means of the changes in the county boundaries made by the statute, then Churchill County was to pay Humboldt County \$3,000 a year for five years; but if less than forty-three miles were transferred, then the amount of payment was to be proportionally less; and that, as a matter of fact, only twenty miles of track were transferred, and all that should be paid was about \$1,400 a year for five years.

P. H. Harris, District Attorney of Humboldt County, for Petitioner.

I. Mandamus is the proper and only remedy. The duty sought to be enforced, viz: the setting apart of revenue, is purely *ministerial*. And if it cannot be enforced by mandamus, the abuse is without remedy. The commissioners alone have the power to set

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apart revenue. If they decline, the Court, by writ of mandate, may compel them to act.

II. When, as in this case, the law enjoins upon a board or officer the performance of a duty which concerns the public, no *demand* is necessary. But mandamus will lie, upon failure to act within the prescribed time. (Moses on Mandamus, 125 ; 37 Penn. 237, 277.)

J. M. Gray and Clayton & Davies, for Defendants.

I. The second section of the statute is in violation of Art IV, Sec. 17, of the Constitution. Two distinct subjects are embraced in it, totally disconnected, and the matters embraced in the second section are not even remotely referred to in the title.

II. The Act is also repugnant to the Constitution of the United States, which forbids the passing of any law impairing the obligations of contracts. All claims against the county of Churchill which had been audited and allowed, and for which warrants had been drawn and numbered, would be impaired if the revenues, instead of being apportioned, as by law required, when they accrued, should be diverted to the payment of a subsequent claim. Such claims were contracts, entered into with the understanding that the county revenues would be apportioned as required by law, and that they would be paid in accordance with the numbers of the respective warrants as the money came into the particular fund chargeable. If Churchill County could be compelled to set apart the money claimed, without regard to the various funds created by law, then clearly Humboldt County would be rendered a preferred creditor, and the rights of other creditors would be impaired and postponed, and might be rendered valueless. (*People v. San Francisco*, 4 Cal. 127 ; *Lafarge v. Magee*, 6 Cal. 650 ; *Robinson v. Magee*, 9 Cal. 81 ; *Smith v. Morse et al.*, 2 Cal. 504.)

III. The alternative writ, if properly issued, should only have commanded the commissioners to act, and in commanding the setting apart of a specific sum, was irregular. And as the peremptory writ must follow the alternative, the peremptory must in

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this case be denied. (*People v. Supervisors of Dutchess Co.*, 1 Hill, 50, 345; *McSpeden & Baker v. Board of Supervisors*, 18 How. Pr. 156; *Tuolumne Co. v. Stanislaus Co.*, 6 Cal. 440; *Price et als. v. Sacramento*, 6 Cal. 254.)

IV. Before defendant will be compelled to act by mandatory writ, demand must be made on him to act, and refusal on his part. (*People v. Romero*, 18 Cal. 89; *Moses on Mandamus*, 202; *Tapping on Mandamus*, 282; 9 Michigan Reports, 328.)

V. If there has been a presentation of this claim, as alleged, and a rejection of it, then plaintiff has its remedy by action at law against Churchill County, and mandamus is not the proper proceeding. (*Crandall v. Amador Co.*, 20 Cal. 72; *Price et als. v. Sacramento*, 6 Cal. 254; 19 Abb. Pr. 376; 13 Penn. 72; 11 Penn. 196; 2 Grattan [Va.] 575; 1 Douglas, 319; 1 Pike, 11; 2 Cowen, 407.)

VI. The county of Churchill ought not in justice to be compelled to set apart revenues to pay Humboldt County, if Humboldt upon a fair settlement is debtor to Churchill. (*Conner v. Morris*, 23 Cal. 447.)

By the Court, LEWIS, C. J.:

The second section of an Act entitled "An Act to amend an Act of the Legislative Assembly of the Territory of Nevada, entitled An Act to create Counties and establish the Boundaries thereof," (Statutes of 1869, p. 88) directs the county commissioners of Churchill County "to set apart annually for five years the sum of three thousand dollars, out of revenues of said county, which sum shall be paid to Humboldt County each year until the sum of fifteen thousand dollars shall be paid." It also provides that "on or before the first day of January in each year the auditor of Churchill County shall draw his warrant on the treasurer of Churchill County, in favor of the treasurer of Humboldt County, for the sum of three thousand dollars in coin, and the treasurer of Churchill County shall pay such warrant on presentation, out of the moneys set apart for the purpose as provided by

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this section. The treasurer of Humboldt County shall place the same into the redemption fund of Humboldt County."

By this law it was clearly made the duty of the commissioners to set apart the sum of three thousand dollars out of the treasury of Churchill County, for the benefit of Humboldt, prior to the first day of January, A. D. 1870. This was not done, and the latter county prays a writ of mandate to compel the performance of the duty thus enjoined.

It is not denied that so far as the language of the law is concerned, the setting apart of the money is unequivocally required; but several defenses are interposed on the part of the commissioners of Churchill County, founded on matters outside of the language of the law itself, which it will be necessary to notice *seriatim*. And first: it is argued the law does not conform to or rather is in conflict with section seventeen of article four of the State Constitution, which reads: "Each law enacted by the Legislature shall embrace but one subject, and matter properly connected therewith, which subject shall be briefly expressed in the title," and is therefore void.

Whilst this section restricts the scope of each law to "one subject, and matters properly connected therewith," it is only necessary in the title to express the principal subject embodied in the law, while the matters properly connected therewith are not required to be mentioned.

I. Thus, the only question involved in the first point made by counsel is, whether the subject of the second section of the Act is properly connected with the matter mentioned in the title. The title of the Act is "An Act to amend an Act of the Legislative Assembly of the Territory of Nevada, entitled An Act to Create Counties and establish the Boundaries thereof." The first section changes the old boundaries of Churchill County, extending them so as to include a portion of the county of Humboldt; then follows the second section above quoted. It does not perhaps distinctly appear from the Act itself that the setting apart and payment of fifteen thousand dollars by Churchill County to Humboldt is connected with the change of the boundaries of the former, but it is well known that when a new county is created from the territory

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belonging to another, it is usual to apportion the indebtedness, if there be any, of the old between it and the new. If in the law under consideration the Legislature had provided that Churchill County should assume and be required to pay the sum of fifteen thousand dollars of the indebtedness of Humboldt, there could be no doubt but that would be a matter properly connected with the subject mentioned in the title, for an apportionment of the indebtedness would be a matter necessarily growing out of and induced by the extension of the boundaries of Churchill County. If, instead of thus apportioning the indebtedness in express terms, it be provided that a gross sum shall be paid by one county to another, in lieu of assuming indebtedness, is it less a matter connected with the change of boundaries of old or creation of new counties? Certainly not. Suppose this Act should declare that in consideration of territory taken from Humboldt and transferred to Churchill, the latter should pay a sum of money in installments; it certainly would not be claimed to be a matter foreign to the subject mentioned in the title, if, as is the case here, the Act did change the boundaries of counties. True, this is not expressed in the law; but we judicially know that a change is effected in the boundaries of Churchill County, by the first section depriving Humboldt of a portion of its territory. Can it not, then, be presumed that the payment was induced by such transfer of territory from one county to another? Nay, is it not quite evident that that was the moving cause for it? It is certainly safe to say that it is not clear that it was not; and in such case the law must be upheld, upon the rule that no Act will be annulled unless it be clearly in conflict with the Constitution.

Can it be said that the setting apart of the money mentioned in the second section of the Act in question is not connected with the changing of the boundaries of the two counties, Humboldt and Churchill? We think not; and hence must sustain the law and hold the first ground taken by counsel untenable.

II. Is it shown that the setting aside of the sum of three thousand dollars out of the revenues of the year 1869 impairs the obligation of contracts? If so, the law must undoubtedly be held inoperative. But clearly that result is not shown in this case. It

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might be that the appropriation of the sum here specified might interfere with and postpone the payment of warrants drawn upon the treasury of Churchill County, and registered at the time of the passage of the law. In that event, the law might be held an unwarrantable interference with the obligation of contracts; as in the case of *Lafarge v. Magee*, 6 Cal. 650. Here, however, the answer shows no such state of facts as will bring it within the rule there laid down. It is not alleged, nor in any way shown, that there were any warrants outstanding against the treasury at the time of the passage of the Act, which would be delayed in payment by reason of the appropriation required to be set apart for payment to Humboldt County. It is simply presented in the answer in this wise: "Respondent denies that at the time of the making of the alleged demand, to wit, on the — day of February, A.D. 1870, or at any time prior or subsequent thereto, or at the time, there was, has been, or now is, the sum of three thousand dollars, or any other sum, derived from the revenues of Churchill County for the fiscal year ending the thirty-first day of December, A.D. 1869, or from any other source, for any other time, in the county treasury of Churchill County, over and above the sums specifically appropriated to pay the salaries of the county officers of Churchill County, and claims audited and allowed long prior to the passage of the Act hereinbefore mentioned, on the twenty-seventh of February, A.D. 1869." Here is an averment showing no impairing of the obligation of contracts. The auditing and allowing of a claim gives the holder no lien upon or right to any money in the treasury, or which may come into it. It is the order or warrant of the auditor which gives that right; no claim against a county being allowed to be paid except upon such order or warrant, and the law declaring that warrants shall be paid in the order of their presentation and registration. But no where in the answer is it alleged or shown that the payment of any *warrant or order* would be delayed or deferred by reason of the appropriation made by this law. And it is quite probable no creditor acquires any vested right until the money has actually come into the treasury, and thereby become subject to the payment of his order. However, should it be admitted that the holders of such claims against the county become vested with any

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rights to money in or to come into the treasury, still, even that would be of no avail here, for it is not charged or in any wise made to appear that there is not a surplus of three thousand dollars after the payment of all such claims; the form of the denial in the answer being, that there is not that sum of money in the treasury "over and above the sums specifically appropriated to pay the *salaries of the county officers* of Churchill County, and claims audited and allowed" prior to the passage of the Act. Now we have been unable to find any law making the setting apart of this three thousand dollars dependent upon prior payment of the county officers. The commissioners are absolutely required to set the money aside for the benefit of Humboldt County. The sum of three thousand dollars is unconditionally required to be set apart. It is in no way made subject to the payment of the salaries of county officers. Of course, the payment of all salaries accruing subsequent to the passage of the law must be deferred, and made subject to the appropriation under this law. Nothing is clearer than that the payment of all ordinary claims against a county is subject to any specific appropriation and setting apart of the revenues of the county for any designated purpose, unless such appropriation interfere with some prior vested right to the revenues or money in the treasury. It certainly cannot be claimed that the county officers of Churchill had any vested right to its revenues for salaries at the time this Act was adopted, for salaries subsequently to accrue. The Legislature undoubtedly has the power to direct that certain claims against the county shall have a preference over all others which are not so situated as to give the holder a vested right to money in or to come into the treasury at the time of legislative action. It is not shown that the county officers had any such vested right to the money required by this law to be set aside on the twenty-seventh day of February, when the Act in question was adopted. The appropriation and setting apart of the three thousand dollars to be paid to Humboldt was not therefore subject to the payment of the county officers, and, *non constat*, that there is not the sum of three thousand dollars in the treasury in excess of that which may be required to pay all claims against the county except their salaries. If, then, sufficient money was realized from

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the revenues over such as might be required to pay such vested demands as might be existing against the county when the Act of the Legislature was adopted, there is no force in this objection. The affidavit upon which the alternative writ was issued avers, that of the revenue of said county of Churchill for the fiscal year ending December 31st, A.D. 1869, there was a sufficient sum paid into the treasury of Churchill County, over and above all sums otherwise specifically appropriated, to pay the claim and demand of Humboldt County. All revenues not so specifically appropriated being subject to the appropriation made by this Act, the averment was clearly all that could be required. It is in effect an averment that there was three thousand dollars in the treasury subject to the appropriation made by the Legislature.

III. The commissioners have no discretion respecting the duties imposed by the law. They are unqualifiedly and unconditionally required to do a specific act, to appropriate three thousand dollars for a designated purpose. In such case, undoubtedly, the writ may and should command the performance of such duty as required by law. Where any discretion is to be exercised by an officer as to the manner in which an act may be done, or rather when the thing desired to be done depends upon the judgment of the officer, in such case the writ will not control his discretion, but only command him to act, without in any way interfering with the manner of his action. When, however, as in this case, a specific act is absolutely required to be done, with no discretion given to the person or persons required to do it, the writ may command the doing of the very act itself. (24 N. Y. 121.)

IV. Was a demand upon the commissioners of Churchill County to set apart the money necessary to be made before the writ could properly issue? Clearly not. The duty imposed upon them is clear and specific. When they failed to perform it as required, the relator became entitled to the writ. There are cases, it is true, where a demand may be indispensable. If, for example, the performance of the duty sought to be enforced is of a character that could not be expected to be performed until demanded, the writ should not issue until demand made. Such are the cases re-

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ferred to from California. In a case of this kind, however, where the law unconditionally requires of public officers the doing of a specific act, it is held that no demand is necessary. (*Commonwealth ex rel. Middleton v. The Commissioners of Alleghany County*, 37 Penn. State R. 237.)

V. Nor do we see how an ordinary action at law will afford the relator the full, speedy and adequate remedy to which it is entitled. This is the only plain, speedy and adequate remedy known to us whereby the Commissioners can be compelled to perform the duty imposed upon them, and in similar cases it has been held the proper remedy.

VI. No Court has the right to annul or set aside a law, except upon constitutional grounds. (See *Gibson v. The Board of County Commissioners of Ormsby County*, 5 Nev. 283.) Hence, any misunderstanding between members of the Legislature respecting its adoption, or even fraud in procuring its passage, cannot be inquired into by the Courts. So far as the Courts are concerned, the statute must be taken as expressing the free will and wish of the Legislature, whatever may have been the means employed to secure its adoption, and irrespective of any agreements or understanding had between members. Such matters the Courts have no power of reaching.

The peremptory writ must issue in accordance with the prayer of the relator.

JOHNSON, J., did not participate in the foregoing decision.

THE STATE OF NEVADA EX REL. CHARLES A. LEAKE
v. HENRY G. BLASDEL.

NINTH JUDICIAL DISTRICT CONSTITUTIONAL. The Act of March 12th, 1867, constituting Lincoln County the Ninth Judicial District (Stats. 1867, 129) is not in conflict with the constitutional clause (Art. VI, Sec. 5) which forbids the change or alteration of the boundaries of a judicial district during the incumbent Judge's term of office.

CREATION OF LINCOLN COUNTY. Lincoln County was unconditionally created by the Act of 1866, (Stats. 1866, 181) and as completely segregated from Nye County by the operation of that Act as it could be by legislative action.

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NEW COUNTY WITHOUT SEPARATE GOVERNMENT. There may be a county without a government of its own; as happens when a new county, created out of another, continues to be attached to and controlled by the government of such other until its own government may be organized.

LINCOLN COUNTY FOR A TIME IN NO JUDICIAL DISTRICT. Lincoln County was created and made a part of the Fifth Judicial District by Act of February 26th, 1866, (Stats. 1866, 131). The next day, (Stats. 1866, 139) the Judicial Districts of the State were changed, and the Fifth District made to consist of Humboldt County, no provision whatever being made for Lincoln: *Held*, that Lincoln County was not included in any Judicial District after February 27th, 1866, until the taking effect of the Act of 1867, (Stats. 1867, 129) which made it the Ninth Judicial District.

EXPRESSIO UNIUS EXCLUSIO ALTERIUS. The Act of February 27th, 1866, designating the Judicial Districts of the State, distinctly provided that the Fifth District should consist of Humboldt County, and omitted all mention of Lincoln County, which had previously been attached to the Fifth District: *Held*, that such a designation was equivalent to an express declaration that no other county than Humboldt was included in the Fifth District.

This was an application for a mandamus, made to the Supreme Court April 2d, 1870. The petition, after setting forth the facts fully, and much as they are set forth in the opinion, proceeded to state that Governor Blasdel refused to issue a commission to the relator as Judge of the Ninth Judicial District, on the ground that the Act of March 12th, 1867, (Stats. 1867, 129) making Lincoln County the Ninth Judicial District, etc., in so far as it authorized the election of Judge Leake in 1868, was in conflict with Art. VI, Sec. 5 of the Constitution. The respondent demurred.

A. C. Ellis, for Relator.

Robert M. Clarke, Attorney-General, for Respondent.

By the Court, LEWIS, C. J.:

It is admitted that the relator was, at the general election held on the third day of November, A. D. 1868, elected District Judge for the Ninth Judicial District composed of the County of Lincoln; but a commission is refused him because it is claimed the Act creating that district was unconstitutional, and therefore that the position to which he was elected had no legal existence. The constitutional clause in question reads thus: "The Legislature may, however, provide by law for an alteration in the boundaries or divisions of the Districts herein prescribed, and also for increasing

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or diminishing the number of Judicial Districts and Judges therein ; but no such change shall take effect except in case of a vacancy or the expiration of the term of an incumbent of the office."

The laws touching the question are : 1st. An Act entitled " An Act to create the County of Lincoln and provide for its Organization," approved February 26th, A. D. 1866 ; the first section of which enacts that " all that portion of the State of Nevada within the following boundaries shall be the County of Lincoln ;" then follows a specific designation of the boundaries. The second section declares : " Whenever a petition shall be presented to the Governor signed by three hundred or more citizens of said county, who shall be at the time of signing such petition registered voters, certified to be such by the clerk of the County of Nye—and it shall be the duty of the county clerk of said County of Nye to make out such certificate—praying for the organization of county government, he shall appoint and commission three persons, legal voters of said county, as county commissioners for said county, who shall immediately on receipt of their commissions qualify by administering to each of them the constitutional oath of office. They shall then elect of their own body a chairman, and then appoint all other necessary county and township officers, who shall qualify and enter upon the discharge of their respective official duties within ten (10) days after their appointments are certified to them.

" The county clerk so appointed may take the oath of office before the chairman of the board of commissioners, and the other officers before said clerk." The third section simply locates the county seat.

Section four provides : " If the county government of said county be organized early enough for the same to be done, said county shall be entitled to, and shall elect in conjunction with Nye County one senator, and one member of the assembly for said county alone. Said county shall be attached to Nye County for all county government purposes until its own is fully organized, and shall be a portion of the Fifth Judicial District until otherwise provided by law." (Statutes of 1866, 131.)

2d. On the following day (February 27th) an Act was approved, changing the Judicial Districts of the State, the new County of

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Lincoln being entirely omitted, and thus not included in any of the new districts nor created a district by itself: and the Fifth District, to which it was attached by the law creating it, (and which consisted of the Counties of Nye and Churchill) by the subsequent law is made the Seventh District. The law redistricting the State was not to take effect until the expiration of the term of the Judges then in office, which would occur on the first day of January, A. D. 1867, and thus no constitutional objection is urged against it. (Statutes of 1866, 139.)

3d. An Act amending the Act creating the County of Lincoln, making it the Ninth District, authorizing the Governor to appoint a Judge thereof, and organizing a county government. (Statutes of 1867, 129.)

It is also admitted that the relator was properly elected, if the County of Lincoln was in fact created by the Act of February 26th, A. D. 1866, and the commission should issue; but it is said it was not, because its creation was by the law itself made dependent upon a certain condition which never transpired. That is a petition by three hundred citizens of the county, asking the organization of a county government; consequently, that it remained a part of Nye County (from which it was intended to create it) and was so at the time of the general election in the fall of the year 1866, at which time a Judge was elected for the Seventh Judicial District, comprising the Counties of Nye and Churchill. Being thus a portion of the Seventh Judicial District, the law approved March 12th, A. D. 1867, constituting the County of Lincoln the Ninth Judicial District, is in conflict with the constitutional clause above referred to, because it changes the boundaries of the Seventh Judicial District during the Judge's term of office, who was elected in 1866.

The error in this position lies in the proposition that the creation of the County of Lincoln was made dependent upon the petition of citizens.

The *county* itself, as we understand the law, was unconditionally created by the Act, and as completely segregated from the County of Nye as it could be by legislative action. It will be observed that no condition whatever is attached to the first section, whereby the

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county is created. It is simply declared that the described territory "shall be the County of Lincoln." Not at any future time—not upon the doing or happening of anything in the future—but upon the passage or approval of the law. The petition referred to in the second section is made a condition precedent to the organization of an independent county government only. This is the language, plain and unmistakable, of the section. A condition doubtless imposed to protect the people of the county from the burdens of a government of its own until its population should justify it. There may be a county without a government of its own, as is often the case; hence, taking the language of the law without qualification or interpolation, but in its ordinary and correct signification, we find that the first section unconditionally creates the county, and the second provides the manner in which and the time when its *government* may be organized, until which time it is attached to Nye County and controlled by its government.

What, then, was the condition of things at the general election held in November, A. D. 1866? We find the Judicial Districts of the State changed, with the express provision that the Fifth District (of which Lincoln County previously formed a part) shall consist of the County of Humboldt. It cannot by any rule of construction be held that this new county still continued a portion of the Fifth District, when the law distinctly designated Humboldt as the county composing it. Such a designation is equivalent to an express declaration that no other county should be included with it. Lincoln County is not included in any of the other districts. The Counties of Nye and Churchill, to which it was previously attached, were made the Seventh District. Hence the Act of 1867, making Lincoln County the Ninth Judicial District, and providing for the appointment of a Judge therefor, in no wise conflicts with the constitutional clause above quoted, because the county was included in no district whatever at the election of District Judges in 1868. The election of the relator at the general election in that year was therefore under a constitutional and valid law; and as no other defense is made to the issuance of his commission, the writ prayed for by him must issue. It is so ordered.

JOHNSON, J., did not participate in the foregoing decision.

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WELLS, FARGO & CO., RESPONDENTS, v. HENRY VAN SICKLE, APPELLANT.

SPECIFIC CONTRACT—GOLD COIN OR ITS EQUIVALENT. Where a promissory note was made payable "in gold coin or its equivalent in United States legal tender notes": *Held*,^a that a judgment on it simply and solely for gold coin was erroneous; that the judgment should have followed the contract, and fixed the amount to be paid, if paid in gold, and the amount to be paid, if paid in legal tender notes.

VALUES IN GOLD OR LEGAL TENDER NOTES. Where parties make a contract payable in gold coin, or its equivalent in legal tender notes, and do not agree upon a place of payment or a standard by which the relative values of the two currencies can be measured, the place and time of trial will be the market where the values should be estimated.

"SPECIFIC CONTRACT LAWS." Where a contract is made payable "in gold coin or its equivalent in United States legal tender notes," it does not require a Specific Contract Act (so called) to empower a Court to enforce it according to its terms.

JUDGMENT FOR GOLD COIN OR ITS EQUIVALENT. A judgment on a promissory note payable in gold coin or its equivalent in United States legal tender notes, should be in the alternative, and provide that if default be made in the payment of gold coin, then, as compensation therefor, an amount in legal tender notes, equal in value at the time and place of trial to such gold coin, should be paid.

APPEAL from the District Court of the Second Judicial District, Douglas County.

The facts are fully set forth in the opinion.

Clarke & Wells, for Appellant.

I. Gold coin and legal tender paper currency are equivalent or equal in law. (*Beatty v. Rhodes*, 3 Nev. 240; *Reese v. Stearns*, 29 Cal. 273.)

II. A contract to pay gold coin or its equivalent in paper currency cannot be enforced for gold. (*Reese v. Stearns*, 29 Cal. 273.)

T. W. W. Davies, for Respondents.

I. The fact that United States legal tender notes have always been and are now at a discount as compared with coin, is notori-

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ous, and this and all other Courts should take judicial notice thereof, or at least admit proof to show what is universally understood in the Pacific States in relation thereto. Such being the universal understanding, it is presumed that all contracts made as the one in question was made, were entered into by the contracting parties having in view such notorious facts as to coin and paper currency. The note was given and received in view of such understanding.

Courts should carry out the intention of the parties, and enforce contracts as they are actually made. Where an expression is used which might have a local signification, the parties should be allowed to show what was universally understood in the community by the use of such expression as the sense in which it was used in the contract. (*Chicago F. & M. Ins. Co. v. Keiron*, 27 Ills. 507; *Pilmer v. Branch B. of the State Bank*, 16 Iowa, 322; *Pugh v. Duke of Leeds*, Cowp. 720; *Robertson v. French*, 4 East, 135; *Thompson v. Sloan*, 23 Wendell, 77; *Farwell v. Fay*, 7 Missouri, 597; *Lampton v. Haggard*, 3 Monroe, 150; *Chambers v. George*, 5 Little, 335; *Roberts v. Short*, 1 Texas, 373; *Schuyllkill Nav. Co. v. Moore*, 2 Whart. 491; *Rindskoff Bros. v. Barrett*, 14 Iowa, 101; Cowen & Hill's Notes, 2 Phil. Ev. 1409, 1412, and numerous cases there cited; *Leiber v. Goodrich*, 5 Cowen, 186.)

II. Courts will judicially take notice of the value and condition of the circulating medium in which the business of the country is conducted, for the purpose of interpreting contracts made payable in it. (*Neal v. Durrett*, 7 J. J. Marshall, 101; *Dollard v. Evans*, 4 Pike, 175; *Farwell v. Kennett*, 7 Missouri, 595; *Roberts v. Short*, 1 Texas, 373; *Lampton v. Haggard*, 3 Monroe, 149; *Leiber v. Goodrich*, 5 Cowen, 186.)

III. Judgment was correct, the note being for gold coin or its equivalent. There is no propriety in holding, as in *Reese v. Stearns*, 29 Cal. 273, that where there is no particular place mentioned, whose market is to fix the value of legal tender notes, the contract cannot be specifically enforced. If no such place is mentioned, the place where the note was given and is payable is

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properly the place where the legal tender note should be valued. *Reese v. Stearns* is opposed to the uniform current of authority in California, and is at war with honesty, justice, and fair dealing. The law is correctly stated in *Lane v. Gluckauf*, 28 Cal. 288, and *Bennett v. Stearns*, 33 Cal. 468.

By the Court, WHITMAN, J.:

This action was brought upon the following writing:

"\$1,500.00.

GENOA, August 4th, 1868.

"Ninety days after date, without grace, I promise to pay to the order of J. & J. Spruance, fifteen hundred dollars in gold coin, or its equivalent in United States legal tender notes, for value received, at — per cent. per month interest until paid.

H. VAN SICKLE."

Upon this contract, judgment was rendered on issue joined, for its amount in gold coin. This specification of currency is assigned as error, and this appeal is based solely on that ground. Among the numerous questions which have arisen upon the complications of currency during and since the rebellion, two may be considered as settled: First, that by the so-called Legal Tender Acts two currencies were established in the United States; one of gold, the other of paper. Second, that contracting parties may lawfully elect between the two, and that such election, evidenced by the insertion or omission in the contract of apt words, will be sustained and enforced by the Courts.

It is under these established principles that the contract in suit is to be tested. Appellant relies upon the case of *Reese v. Stearns*, decided by the Supreme Court of the State of California. That case as considered by that Court was precisely similar to this, and it is said "The language is 'or the equivalent of such gold coin if paid in legal currency,' which is doubtless the same in legal effect as it would be if the language were 'or the equivalent of such gold coin if paid in money,' or other lawful money." The currency referred to must be the legal tender notes of the United States, or silver coin, for we know of no other legal currency to which reference could have been made. In contemplation of law,

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a dollar in legal tender notes is equal to, and therefore the equivalent of, a dollar in gold coin. In comparing the two kinds of money the law knows no difference in value between them. It recognizes no other standard of equivalents. And when parties speak in their contracts of an amount of one kind of money being the equivalent of another kind, without referring to any conventional or other known standard by which the equivalents are to be adjusted, we cannot assume that any standard other than the legal one is intended. If otherwise, where are we to look for the standard by which we are to be guided in the comparison? Where are we to find the yardstick by which to measure the comparative values of the two different kinds of currency, which the law says are equal, but which the commercial world says are not equal, and the relative values of which are not the same in any two cities in the country? Shall we seek it in Wall Street, Montgomery Street, Salt Lake, or Los Angeles? If under any of these peculiar contracts the Courts can enter into a comparison of values between a dollar in gold and a dollar in treasury notes, which in contemplation of law are equal, it must be because it is expressly so agreed, and there should at least be some conventional standard of comparison adopted in the agreement. Where none is adopted, the standard of equivalents must be that which the law establishes. Tried by this standard any given number of dollars in legal tender notes is equivalent to the same number of dollars in coin. (*Reese v. Stearns*, 29 Cal. 273.)

If the conclusion reached be correct, the appellant here is right in his position. But is the conclusion correct?

That for the payment of all private debts contracted since March, 1862, a legal tender paper dollar of the United States is, and has been since that date, the legal equivalent of a gold coined dollar of the same Government, is true. It is equally true that in the United States the one is not and never has been the mercantile or actual equivalent of the other. A gold dollar will and would buy more than one legal tender paper dollar in the market. Courts should not and do not ignore this fact, universally known and conceded. The very case from which quotation has been made recognizes the distinction.

Such then being the case, it necessarily follows that this recog-

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nized acknowledged fact, universally acted upon in business circles, becomes an important element in the construction of any contract made with reference to its existence. A contract not illegal is to be construed and enforced so as, if possible, to attain the intention of the parties thereto, and for such attainment it is always proper to look at the general circumstances surrounding its making. Viewed in this light, what is the natural reading of the contract in question?

It would seem that neither lawyer nor layman could differ on that proposition. The contract made as portion of a mercantile transaction, attempts to secure the payment of a particular kind of legal currency, gold coin; acknowledged to have more intrinsic value in such transactions, dollar for dollar, than legal tender paper notes; and it attempts to provide for a compensation in event of default of such payment, by securing the payment of an equivalent. What sort of an equivalent? And here is the key, if key be needed, to the whole matter. Certainly, not the equivalent suggested by the Supreme Court of California, which is merely nominal, but an actual, practical, mercantile equivalent; that which would buy as much as the gold; that which would sell for as much in open market; that which in the ordinary use of language is worth as much. Such is the interpretation which must be given this contract, or else it must be admitted that many superfluous words have been used, or that the intention being apparent, the words used are so inapt that the intention must be disregarded.

To adopt the first suggestion would be to unwarrantably interfere with the language used. To follow the second, would be to torture from their plain, ordinary meaning, words which no business man would misunderstand.

It remains to be seen if this contract can be enforced. It was said in the case cited, that one similar could not, because there was no conventional standard of comparison of rules between the two currencies adopted in the agreement; but the same Court held in *Lane v. Gluckauf*, that in case such standard was agreed upon, there would be no difficulty about the form of judgment, saying: "It is, then, an alternative contract, and provides for payment in either of the two kinds of money, at the election of the defendant,

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both of which are therein specified. The precise amount to be paid, if paid in one kind, is fixed; if paid in the other kind, the mode by which the amount is to be ascertained is clearly defined, and by that mode can be readily determined with certainty. Such being the case, the judgment by the terms of the Act in question ought ordinarily to follow the contract, and fix the amount to be paid, if paid in gold coin, and the amount to be paid, if paid in legal tender notes. The defendant could then have it paid off in either kind of money. If he did not pay voluntarily the execution would have followed the judgment, and alternatively directed the sheriff to collect in either kind of money. At the sale, the defendant could have directed the sheriff to sell for gold or legal notes at his option. If he did not so direct, the plaintiff or the sheriff could have elected." (*Lane v. Gluckauf*, 28 Cal. 288.)

Although this case proceeds upon the basis of a fixed standard agreed upon, and the Specific Contract Act, neither is necessary to the conclusion.

If the parties do not agree upon a standard by which the relative values of the two currencies can be measured, the law fixes it for them; and in the present instance there being no specified place of payment, the place of trial would be the market where the values should be estimated at its time.

There is no need of a Specific Contract Act, (so-called) to empower a Court to enforce a contract like the one in suit. It follows as the natural result of the propositions first stated in this opinion. In conclusion, then, this contract is not illegal.

It is in the alternative. If default be made in the payment of gold coin, then as compensation therefor the market value of such gold coin, at the time and place of trial, is to be assessed upon proper proof made, in legal tender paper dollars; and judgment should be entered accordingly, as suggested in the case last cited.

The judgment of the District Court being simply and solely for gold coin is erroneous. It is reversed, and the case is remanded with directions to proceed as indicated herein.

JOHNSON, J., did not participate in the foregoing decision.

Hillyer v. The Overman Silver Mining Co.

CURTIS J. HILLYER *et al.*, RESPONDENTS, v. THE OVERMAN SILVER MINING COMPANY, APPELLANT.

CONTRACTS OF CORPORATIONS—UNAUTHORIZED STATEMENTS OF OFFICERS. Officers of a corporation, who cannot bind the company in a contract by directly executing it on its behalf, cannot impose any such liability upon it by stating or persuading a person that the company itself had done so, when in fact it had not.

EVIDENCE OF CONTRACT—DIRECT PROOF AS OPPOSED TO PRESUMPTION. Where an attorney proposed to do the legal business of a Mining Company for a certain period at a certain rate per month, the mere fact that his bills at that rate for several months had been allowed and paid, though sufficient to raise a presumption of the acceptance of his proposition, would not overbear direct evidence that the proposition was not submitted to or acted upon by the company, and consequently never accepted.

CONTRACTS—MEETING OF MINDS. There can be no valid executory contract unless there be a meeting of the minds of the respective parties upon its terms and conditions; they must assent to the same thing in the same sense.

CORPORATION TRUSTEES CAN ONLY ACT AS A BOARD. The trustees of a corporation can only bind it when they are together as a Board, acting as such.

APPEAL from the District Court of the First Judicial District, Storey County.

This action was commenced October 12th, 1869, by C. J. Hillyer, W. S. Wood and W. E. F. Deal, composing the law firm of Hillyer, Wood & Deal, against the defendant, a corporation organized under the laws of California, but engaged in the business of mining in Storey County. It appears that the law firm of Hillyer & Whitman had been employed by the defendant as its attorneys for the year 1868, at the rate of \$250 per month. On being notified near the end of that year that the contract was about to run out, the company declined to make any change. In November, 1868, Hillyer & Whitman dissolved, after which Mr. Hillyer continued to act as defendant's attorney. At the beginning of 1869, the new firm of Hillyer, Wood & Deal was formed, and soon afterwards the proposition referred to in the opinion was handed by it to the defendant's superintendent. In July, 1869, a new board of trustees assumed office, and among other things, changed the attorneys of the company.

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In addition to the points of counsel noted below, the interesting question as to whether a board of trustees can employ an attorney for a period to extend beyond the term of its own existence was discussed at some length; but as the Court did not pass upon it, the heads of argument upon that subject are omitted.

Williams & Bixler, for Appellant.

I. Plaintiffs do not pretend to the right of recovery for services rendered, as none were performed during the months of July and August, for which time they claim the salary mentioned in their complaint.

II. No such contract as is alleged was ever made. None was made with McCullough, the superintendent, nor was any made with the board of trustees. All McCullough pretended to do in relation to it was to transmit plaintiffs' proposal to contract to the office in San Francisco, and verbally communicate to them the answer which he had received. Afterwards, in execution of a supposed contract, he paid plaintiffs \$250 per month. McCullough did not pretend or attempt to contract with plaintiffs; on the contrary, his whole action shows a disavowal of any such intention. He simply said: "If you will make a proposition, I will send it to the office in San Francisco for action there," and afterwards said: "I am informed that your proposition has been accepted."

No contract was made with the board of trustees, because they never knew of the proposition and consequently could not have acted upon it; and the only fact which can be claimed to have ever come to their knowledge was, that McCullough, their superintendent, paid at the end of each month, out of the company's funds, the sum of \$250 to plaintiffs for professional services rendered during the preceding month. This, notwithstanding the fact that the receipt to McCullough stated that the money was for services as per contract, did not, we submit, constitute a contract to retain plaintiffs as counsel for one year, and to pay them \$3,000.

III. The main features of this case are very similar to those of *The Yellow Jacket Co. v. Stevenson*, 5 Nev. 224. There the president, being also a trustee and superintendent, actually made

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the contract in writing and signed it for the company, so there was an unauthorized contract to ratify; but the Court held the company not liable. In that case the contract was in the company's vault, which fact was known to the president and secretary; in this, only a proposition to contract was in the company's safe, which was known to the president and secretary. In that case, four of the seven trustees knew that Stevenson was acting upon some sort of a contract; in this, only one knew that the proposition to contract had been made. In that case, the board knew that money was received for ores without knowing the particulars, and approved the action of the superintendent in receiving it; in this, the board knew money had been paid for legal services without knowing the particulars; and in that case, the other party had been led by the action of the president in contracting with him, to invest money and labor in the venture, while in this the other party have invested neither.

IV. The company could only contract through its board of trustees or an authorized agent, except in case an authorized agent assumed to act, and that act was afterwards ratified by the board of trustees by direct action, or by non-action, within reasonable time after full knowledge of the facts. A board, as such, can only act when assembled and organized as such. (*Angell & Ames on Corporations*, Secs. 297-8; *Blen v. Bear River Co.*, 20 Cal. 602; *Fulton Bank v. N. Y. & S. C. Co.*, 4 Paige, 132; *Haight v. Thompson*, 1 Seld. 322; 7 Conn. 219; 12 N. H. 205, and 20 Vt. 446.)

V. To recover at all, it devolved on plaintiffs to show a legal contract, which they failed to do. (15 Barb. 324; *Finley v. Bristol*, 9 Eng. Law & Eq. 483; *Pixley v. W. P. R. R. Co.*, 33 Cal. 196.)

Hillyer, Wood & Deal, for Respondents.

I. The defendant must be held to have had official notice of plaintiffs' proposition, because it was sent to the president, through whom the superintendent communicated with the board. The proposition was received by the president, and remained in the

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keeping of the officer of the company whose business it was to keep such papers. Defendant ratified the contract by its silence, after being informed as to its terms. It had notice at the end of every month up to the fifth of July, 1869, that two hundred and fifty dollars per month was being paid plaintiffs upon a contract, the terms of which were known to it. The superintendent, in the usual course of his business, sent these vouchers to the office at San Francisco, and they were allowed by defendant. The plaintiffs were not informed of any desire to recede from this contract until July 10th, 1869, after the election of the new board. Between January and July, both the president and secretary personally consulted with plaintiffs in regard to the pending cases which they had been attending to. It follows that the contract was ratified by defendant. (12 Metcalf, 343; 16 Wisconsin, 120; 5 Cushing, 179; 1 Black. 539; 6 McLean C. C. R. 109; 15 Barb. 324.)

II. A corporation acting through an agent is held to the same liability as an individual. If it allows its agent to transact certain business, and by its silence leads those dealing with it to believe he acts under authority, it is bound by the acts of such agent just as any other principal would be by the acts of his agent. The acts of defendant are inconsistent with any other supposition than that it fully knew of the contract. In such a case, the presumption of a ratification is conclusive. (Story on Agency, Sec. 253; *Bank of the U. S. v. Dandridge*, 12 Wheaton, 70.)

III. The question of ratification being a question of fact, if there is a conflict in the testimony, this Court will sustain the finding of the Court below.

IV. In *The Yellow Jacket Co. v. Stevenson*, 5 Nev. 320, the one thing essential to support a contract was lacking. The board had no knowledge whatever that Stevenson was holding under a lease. The money paid by him to the Yellow Jacket Company was returned as for ore sold. If it had been shown that during the time Stevenson held a portion of the mine, accounts had been brought before the board at the end of every month, showing so much money paid by him as rent, and that such accounts had been examined and passed upon by the board, the

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Court would have been warranted in holding that the relation of landlord and tenant existed between him and the company.

V. The contract was an executed contract. Nothing remained to be done by defendant to render it binding upon plaintiffs.

By the Court, LEWIS, C. J. :

A judgment was recovered by the plaintiffs in this case against the Overman Silver Mining Company for the sum of five hundred dollars, upon a contract claimed to have been entered into between themselves and the defendant, by the terms of which the Company agreed to pay them a salary of two hundred and fifty dollars a month, during the year 1869, for transacting and attending to its legal business. This salary was regularly paid up to the month of July, at which time the defendant refused to make any further payment, claiming that it had entered into no such contract with plaintiffs as claimed by them. The only question now in the case is, whether any agreement to continue for the term of a year was in fact executed by the defendant. The Court below found there was, and thereupon rendered the judgment from which this appeal is taken, but we find the evidence does not warrant such a result. It appears that at the request of the defendant's superintendent the plaintiffs, in the month of December, A.D. 1868, submitted a written proposition to the defendant, whereby they agreed to transact and attend to all the legal business in which the defendant might be interested in the State of Nevada during the year 1869, for the sum of two hundred and fifty dollars per month. It is not claimed by the superintendent, nor does it appear to have been the understanding of plaintiffs, that that officer had the authority to execute a contract of that kind on behalf of the defendant. Neither was there any attempt on his part to do so. The evidence shows that he asked plaintiffs to make a proposition so that he might submit it to the company, and not with a view to acting upon it himself. The proposition was given to the superintendent, who sent it to the president or secretary at San Francisco.

As the superintendent did not pretend to execute the contract, or employ plaintiffs, it is necessary only to determine whether the

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board of trustees, who alone were the authorized agents of the company to represent it in the making of such contract, executed it. It is not claimed that any contract was made, except by the acceptance of the proposition submitted by plaintiffs. Was it accepted by the board of trustees? We think it is not proven that it was, but the converse rather is established by the defendant. The secretary of the company, whose duty it was to be present at the meeting of the board, and to keep minutes of its proceedings, testifies that the proposition of plaintiffs was never brought before the board, or acted on by it. Several of the officers undoubtedly knew of the proposition, and may have led plaintiffs to believe, by conversations and otherwise, that their proposition had been accepted; but these officers, who could not bind the company in a contract of this kind by directly executing it on its behalf, certainly could not impose any such liability upon it by simply persuading a person that the corporation itself had done so, when in fact it had not. As the case is presented here, neither the president, superintendent, nor both, had the power to execute the contract sued on. That authority is by law vested in the board of trustees, and it is not claimed that it had been delegated to those officers, or that they had been authorized by the board to act for them.

It is shown by plaintiffs that bills were presented to the board for the salary claimed by them, and that they were allowed, and, indeed, paid. This evidence would doubtless raise the presumption that the plaintiffs' proposition had been accepted by it, and was sufficient to justify that conclusion, were it not overborne by direct evidence that such was not the case. Here it is affirmatively shown that the proposition was not submitted to or acted on by the board, and thus the presumption which might otherwise arise from its action allowing the bills is entirely destroyed. Why the claims were allowed and the money ordered paid to plaintiffs, is a question not necessary to be inquired into. It is sufficient here that they did not accept the proposition.

There can be no valid executory contract unless there be a meeting of the minds of the respective parties upon its terms and conditions. "There is no contract," says Parsons, "unless the parties thereto assent, and they must assent to the same thing in the same

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sense." (1 Parsons on Contracts, 899.) Can it be said that the board of trustees of the Overman Company assented to the terms proposed by the plaintiffs in their proposition, when it is sworn the proposition was never brought before it, or in any way acted upon by it, and indeed the board did not know of its existence, as appears to be the case? The trustees can only bind the corporation under our law when they are together as a board, acting as such. (See *The Yellow Jacket Company v. Stevenson*, 5 Nev. 224.) The plaintiffs' proposition not having been brought to the knowledge of the board, it cannot be presumed it knew anything of it, and consequently cannot be held to have accepted it. The burden of establishing the contract was upon the plaintiffs; having failed to do this, the judgment must be reversed.

EDWARD CAHILL *et al.*, RESPONDENTS, *v.* A. HIRSCHMAN, APPELLANT.

PLEADING—AFFIRMATIVE MATTER IN ANSWER CONSIDERED DENIED. Under the practice in this State, all affirmative matter in an answer is taken as denied.

STOCK-BROKERAGE—WAIVER OF DELIVERY OR TENDER. Where a broker buys stock for his principal, and the principal before receiving it orders the broker to sell it again on the principal's account, this amounts to a waiver of any delivery or tender of the stock by the broker to the principal.

BOOKS OF ACCOUNT—LEDGER AS EVIDENCE. A stock-broker's ledger is not a book of original entry, and is not competent to prove an original purchase or transaction; but it is competent testimony in rebuttal in explanation of a bill sent by the broker to the principal, and to supplement the broker's own testimony that such bill was not general, as claimed, but only a partial bill.

EVIDENCE OF SALES OF STOCK FOR ASSESSMENTS. An indorsement by the secretary of a company on a certificate of stock, to the effect that the same had been sold for assessments, as well as evidence that the secretary had made statements to the same effect, is mere hearsay, and not competent to prove the fact of any sale for assessments.

NO REVERSAL FOR ERROR WHICH DOES NOT PREJUDICE. A judgment will not be reversed on account of error in admitting immaterial or incompetent testimony, when it appears that the appellant could not have been prejudiced thereby.

APPEAL from the District Court of the First Judicial District, Storey County.

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Edward Cahill and Dennis Driscoll, the plaintiffs, were stock brokers in San Francisco, California, where most of the business referred to in the opinion was transacted in the year 1868.

Williams & Bixler, for Appellant.

I. Plaintiffs claim that the fact that defendant, before the commencement of the action, ordered or directed them to sell the stock changed the status of the parties, and constituted plaintiffs from that time the mere agents of defendant, to hold the stock subject to his orders.

In what respect did such change occur? Certainly the title to the property still rested in plaintiffs, and defendant had no more right to its custody than previous to that time. They still had the right to hold it, or to foreclose as against it by sale or process of law, while his only right was to have it when he paid for it. In the first instance the legal title to the stock was in plaintiff, while defendant merely had an equitable interest in it. If their relations changed, then the legal title passed to him while they merely held an equitable lien on the property. But no such change could have been effected, because plaintiff could have as effectually passed the legal title to a third party after the order to sell as before.

II. Tender was necessary before suit. (*Merwin v. Hamilton*, 6 Duer, 244, and cases cited on page 250; *Dunham v. Mann*, 4 Seld. 512; *Lester v. Jewett*, 1 Kern. 456; *Callowell v. Briggs*, 1 Salk. * 113; *Thorpe v. Thorpe*, 1 Salk. * 172; *Bank of Columbia v. Hagner*, 1 Peters, 464; *Danar v. King*, 2 Pick. 157; *Kane v. Hood*, 13 Pick. 282; *Currie v. White*, 37 How. P. R. 350; *Suffolk Bank v. Worcester Bank*, 5 Pick. 105; *Sherwood v. Sissa*, 5 Nev. 849.)

III. The Court erred in admitting proof of contents of plaintiffs' ledger; because the same was not a book of original entries. (4 Strob. 193; 1 Phil. on Ev., Cowen & Hill's Notes, 4th Am. Ed. 385; *Landers v. Turner*, 14 Cal. 573.)

IV. The Court erred in admitting hearsay testimony concerning the American stock. There being no proof of any sale of that stock for assessments, defendant was not responsible for the

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voluntary payments made by plaintiffs. (Dunlap's Paley's Agency, 109.)

R. S. Mesick and Hillyer, Wood & Deal, for Respondents.

I. A tender of the stock before suit was not necessary ; because, on being informed of the purchase and payment of the money for him, defendant agreed to reimburse plaintiff for that sum without any condition of a delivery to him of the stock, but with the strongest possible grounds indicating an understanding that no such delivery was to be made ; because the course of dealing between the parties showed that it was their mutual understanding that an actual delivery of the stock was waived as a condition of the repayment of the purchase money ; and because there was a positive agreement between the parties that the stock should not be actually delivered to the defendant, but should be held by plaintiffs as stock delivered to them by defendant, for sale at a minimum limit. This amounted to a delivery.

We do not, however admit that but for the direction of the defendant to hold and sell the stock it must have been tendered to defendant as a condition to plaintiffs' right of action. The case is not one of sale of property by plaintiffs to defendant, where to pay and to deliver are cotemporaneous obligations ; but it is an action for money paid out and expended by agents for their principal at his request.

II. The page of the ledger admitted in evidence was not admitted either to prove the purchase of the stock or the payment of the money by the plaintiffs. It was offered and admitted to show that defendant's pretense of the money not having been charged to him was unfounded. There was a conflict between Hirschman and Cahill as to whether the accounts kept by plaintiffs contained any charge of this item against defendant, and the only positive proof which could be introduced was the ledger. It could not have injured the appellant in any way.

By the Court, WHITMAN, J. :

This action was brought by respondents, stock brokers, to recover from appellant the several sums of \$2,474.50 and \$1,151.02

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—the first for money paid for ten shares of the stock of the Imperial Gold and Silver Mining Company, alleged to have been purchased for appellant by respondents on his express order; the second for balance due on general account, involving various stock transactions, among others, one touching stock of the American Mining Company. Appellant answered, admitting the purchase of the Imperial stock; denying that it had ever been tendered to him; averring that he had, shortly after its purchase, directed Cahill (respondent) to sell the same; that Cahill had neglected to do so, and had agreed to take it on his own account and relieve appellant therefrom. With regard to the second amount claimed, appellant admitted the correctness of the account, with the exception of certain items specified, and offered to allow judgment for the sum of four hundred and fifty dollars. Respondents had verdict and judgment for three thousand one hundred and eighty-one dollars and fifty cents, and from that and the order of the District Court refusing a new trial this appeal is taken.

Under the practice in this State, all affirmative matter in the answer is taken as denied, so it became a question before the jury as to the status of the Imperial stock upon the averments of appellant, the original purchase being admitted. There was a conflict of proof—appellant testifying in support of the averments of his answer—and respondent Cahill giving evidence that after the original purchase he had been directed by appellant to sell the Imperial stock at a certain limit, which had not, up the present time, been reached. That the jury accepted this version is evident from the verdict; and as a decision of this question was entirely within their province as the evidence stood, this Court will not interfere with such action.

This view disposes of the objection that without tender the respondents should not recover, for if both parties were agreed to treat the stock as that of appellant, as is evident from his order to sell, and the acceptance of the agency so to do by respondent Cahill, any tender or offer of the stock before bringing the present suit was unnecessary. As the case stands upon the facts found by the jury, respondents are entitled to their money advanced for appellant for the original purchase of the stock, which

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they hold as his agents to sell, when the price fixed is reached. The two agencies are distinct, and that of buying was accomplished upon the purchase, nothing then remaining to terminate the relations of the parties but the delivery of the stock and receipt of the money paid therefor. Before this was done, however, appellant ordered respondent Cahill to sell the stock on his account, thereby expressly directing him to retain the same, which was a complete waiver of any delivery or tender.

The testimony does not seem to have been strictly confined to the issues made, and that fact has probably led to the introduction of many questions into the case not legitimately there, which it would be not only unnecessary but improper to discuss. The only question as to the Imperial stock tendered by the pleadings was as to the ownership, whether it belonged to appellant or respondents. The jury by verdict found it to be that of appellant, as upon that premise alone could be founded a recovery for its purchase price.

In support of his testimony, appellant introduced a bill to him from respondents, made by their clerk from their ledger, which did not include any charge of the Imperial stock, though made after its purchase. Respondent Cahill, called in rebuttal, swore that the bill was intended only as a partial bill, and was so made out at the request of appellant; and to sustain this position offered a page of his ledger which contained the charge for Imperial stock, and one other item in addition to those of the bill referred to. To this appellant objected: "1. That the book in which the same was contained, namely, the said ledger, was not a book of original entry, and that the book of original entry should be produced. 2. That the book itself and the page offered in evidence was not in rebuttal of the defendant's case. 3. That the same did not contradict the account which defendant testified had been delivered to him by Cahill, and only introduces items preceding and subsequent to the period embraced by that account." These objections were overruled and the page admitted, which is assigned as error. The ledger was not a book of original entry, and the page would have been inadmissible had the object been to prove the original purchase or transaction; but it must be remembered that this was admitted,

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so it was unnecessary to limit the effect of the testimony in its offer, or to specifically define its purpose, as the only fact other than for which it was offered which it could have tended to have proved was not in issue as the case stood. It was certainly in rebuttal of appellant's testimony, or of the inference therefrom and effect thereof, as it tended to support the evidence of respondents that the account claimed by appellant to be general was only partial; and while it did not contradict that account, it tended to explain and avoid the inference sought to be deduced therefrom. For such purposes it was competent testimony, and was properly admitted.

The transaction in American stock was this: Appellant gave respondent Cahill twenty-five shares to sell, which he did at fifteen dollars per share, and paid the proceeds to appellant, less commissions. Subsequently, reclamation was made from Cahill by the purchaser upon the ground that the stock was worthless, having been previously sold for assessments. Cahill satisfied himself that such was the fact, and refunded the money, charging appellant with the stock as repurchased; and the issue made by the pleadings was, that he never bought any such stock for appellant. Upon the trial, the certificate of American stock sold by Cahill was offered with the endorsement thereon of the secretary of the company that the same had been sold for assessments. Cahill also testified that all he knew about the sale was what Bagley, the secretary, had told him.

The certificate with its endorsement and Bagley's statement were both objected to the ground of hearsay, and that neither tended to prove the fact of sale for assessments. The objection was overruled in each instance, and the paper and statement admitted. This is assigned as error. It would have been, had the object been to prove the fact of sale of the stock for assessments; but such could not have been the object, as there was no such issue. This appears from the pleadings and evidence. Cahill did not swear as matter of fact that the stock was sold, but that such was the claim made by its purchasers, and that he took steps to assure himself of the truth of the statement, before he returned their money. His theory seems to have been that he could not recover from Hirschman unless he acted in good faith in this regard, and that conse-

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quently it devolved on him to show the nature and kind of inquiry made and the sort of testimony upon which he acted ; but as Hirschman makes no issue as to the sale of the stock, the testimony was immaterial and any error in admitting it was equally immaterial, as the appellant could not thereby be prejudiced.

The only instructions complained of are touching the question of tender, which was not involved in the case, if the view of the relative positions of the parties heretofore stated be correct.

There was then no error in the judgment or order of the District Court, and the same are affirmed.

JENNIE C. FITZPATRICK, APPELLANT, v. JERRY FITZPATRICK, RESPONDENT.

IRREGULARITIES OF PRACTICE NOT OBJECTED TO. Though the proceedings of a District Court are plainly irregular in point of practice, yet if no objection be made on that ground, such irregularity will not be considered in the Supreme Court.

CONSTRUCTION OF MARRIAGE STATUTE. The proviso in the Marriage Act to the effect that the issue of a marriage of persons not of lawful age shall not be illegitimate, (Stats. 1867, 88) refers to the issue of marriages of persons under eighteen years in males and under sixteen in females.

MARRIAGE STATUTE—MARRIAGEABLE AGE. The proviso in the Marriage Act against the illegitimacy of the issue of a marriage of persons not of lawful age, (Stats. 1867, 88) does not indicate any intention on the part of the Legislature to render marriages of males between eighteen and twenty-one, or of females between sixteen and eighteen, void on account of being made without the consent of parents or guardians.

LAWFUL AGE OF MARRIAGE, WHAT. The lawful age of marriage in this State is eighteen years in males and sixteen years in females : and marriages made by persons of such age are valid and binding, though made without consent of parents or guardians.

DIVORCE—WANT OF LEGAL AGE. Where a female of the age of sixteen years entered into a marriage "without force or fraud, and with her full and free consent": *Held*, that there was no ground of divorce on account of want of legal age, though there was no consent by any parent or guardian.

APPEAL from the District Court of the Eighth Judicial District, White Pine County.

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It appears from the referee's report that the marriage ceremony took place in Hamilton City, White Pine County, on September 2d, 1869, before a justice of the peace. The plaintiff, whose maiden name was Jennie C. Dirks, was the daughter of Mrs. Theresa Dean, wife of James Dean by a former marriage. Mrs. Dean at the time of her marriage with James Dean reserved to herself the management and control of her separate property, and the full and sole guardianship and control of her children by her former marriage, of whom the plaintiff was one. It appears that James Dean gave his consent to the plaintiff's marriage so far as he could do so; but Mrs. Dean, the mother of plaintiff, was not consulted in reference to the marriage, and did not assent to it. It further appears that the parties never cohabited, and that the plaintiff herself was desirous of avoiding the marriage.

The referee deduced a conclusion that the marriage was voidable *ab initio* for the want of capacity in plaintiff to give her consent to said marriage, and from the failure to procure the consent of her mother and legal guardian; and that she was therefore entitled to a decree.

D. S. Terry, for Appellant.

[Counsel devoted much of his brief to alleged fraud and perjury in the procurement of the marriage; but as these questions did not arise or were not considered by the Court, we pass to his points in reference to the matter decided, namely:]

The plaintiff, by reason of want of age was incapable of contracting a valid marriage, except with the consent of her parent or guardian. The statute provides that marriage by females under the age of eighteen shall be contracted only with the consent of their parents or guardian, and a penalty is imposed on the county clerk who shall issue a license for the marriage of such minor without such consent.

It is true, that the current of authority is to the effect that such marriages under statutes similar to ours are not void because of non-compliance with the provisions of the law, though a penalty has been incurred by those assisting in the solemnization. But in the cases in which decisions have been rendered, the marriages have

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usually been followed by cohabitation ; and upon grounds of public policy, in order to protect society, as well as the innocent party to such marriages, they have been upheld. These reasons do not apply to marriages which have not been consummated, as in the present case. Besides, the statute of Nevada is peculiar in providing that nothing in it shall be construed to make the issue of any marriage illegitimate, if the person or persons shall not be of "lawful age." Evidently the Legislature intended by this that all marriages entered into except as provided in said act should be void. If this was not their intention, then that portion of the act which provides against bastardizing the issue of such marriages is mere surplusage and without meaning, for the reason that it would be the merest folly to provide by statute that issue of a valid marriage shall not be illegitimate.

Pitzer & Campbell, for Respondent.

By the Court, WHITMAN, J. :

This was an action for divorce brought in the District Court of the Eighth Judicial District, and by that Court referred by the following order: "By consent in open Court the above cause is ordered referred to D. W. Perley, Esq., to take the testimony herein and report the same to this Court with the proper order therein."

Acting thereunder, the referee took the testimony offered, and filed his findings of fact and conclusions of law, to the effect that plaintiff was entitled to a decree of divorce. On the same day the Court set aside the report and directed a judgment for defendant, which was subsequently entered. From that judgment this appeal is taken.

The course pursued by the District Court would seem to be irregular in point of practice, in any view of the force of the order of reference. If the reference was general, as was evidently the understanding of the referee, then his report stood as the decision of the Court, and upon filing, judgment should have been thereon entered, unless such decision had been altered or amended. (Stats. 1869, 224-5.) If the reference was to find the facts, then the

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report stood as a special verdict, (Stats. 1869, 225) and upon that special verdict the Court should have found conclusions of law. (Stats. 1869, 223.) But as no objection is made to the action of the Court in this regard, and the case is argued entirely upon its merits, the judgment being objected to as erroneous under the law of divorce, the case will be considered as presented; and the only point decided will be, whether under the findings of fact by the referee, the conclusions of law practically deduced by the Court, as evidenced by the judgment, are correct.

The statute of this State provides that "male persons of the age of eighteen years, and female persons of the age of sixteen years, not nearer of kin than second cousins, and not having a husband or wife living, may be joined in marriage: *provided always*, that male persons under the age of twenty-one years and female persons under the age of eighteen years shall first obtain the consent of their fathers respectively, or in the case of the death or incapacity of their fathers, then of their mothers or guardians; *and provided further*, that nothing in this act shall be construed so as to make the issue of any marriage illegitimate, if the person or persons shall not be of lawful age." (Stats. 1867, 88.)

It is admitted by counsel for appellant that it is commonly held under similar statutes, that the lack of the consent of parent or guardian does not invalidate the marriage; but it is claimed that the second proviso, above quoted, alters the effect of the statute, and evidences the intention of the Legislature to make such marriage void, by carefully providing against evil results to its issue. That proviso cannot indicate any such intent, as it only relates to the issue of persons not of lawful age—that is, not of the age of eighteen years in the male or sixteen years in the female. Those are the lawful ages; any thing less would be unlawful under the statute; so that proviso applies merely to the issue of persons marrying under the ages mentioned, and does not touch the question in hand.

It has been said that the ages of eighteen and sixteen, for males and females respectively, are lawful ages of marriage. Now, it remains to be seen what is the effect of the first proviso, and how a marriage between persons of lawful age is affected, if at all, by

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reason of non-consent of parent or guardian. In deciding this question, the hardship of a particular case can properly have no effect. What the authorities have declared the law to be, must be the rule of decision.

By the common law and the statute law of this State, (Stats. 1861, 94) marriage is held to be a civil contract. To render the contract valid, the parties must be able and willing to contract. At common law the age of capacity to make the contract of marriage was fixed at fourteen years for males and twelve years for females, upon the supposition, all things considered, that such provision was for the best interests of society; and by so fixing the age of capacity or contract, the inference naturally follows, "that the parties at that age have sufficient discretion for such a contract, and they can then bind themselves irrevocably, and cannot be permitted to plead even their egregious indiscretion, however distressing the result of it may be. Marriage before such age is voidable at the election of either party, on arriving at the age of consent, if either of the parties be under that age when the contract is made." (2 Kent, 44.)

The statute of this State does not alter the common law, save by substituting the ages therein named for the common law ages; and it has been generally, if not universally held, in construing similar statutes, that in the absence of any provision declaring marriage made in violation of the statutory proviso void, it was a valid and binding contract, upon the theory that persons of the consenting or lawful age, voluntarily entering into a contract, should be held thereto precisely as they would be held to any other lawful contract voluntarily assumed at the legal age, or upon majority. In other words, that the age fixed by statute as the age of consent, renders parties of such age no longer infants with regard to that special contract. (*Goodman v. Thompson*, 2 C. Greene, (Iowa) 329; *Parton v. Hervey*, 1 Gray, 119; *Hervey v. Mosely*, 7 Gray, 479; *Dumaresly v. Fishley*, 3 A. J. Marshall, 369; *Rex v. Birmingham*, 8 B. & C. 24; 2 Greenlf. Ev., Sec. 460; 2 Kent. Com. 52.)

In the case at bar the evidence was conflicting on some points, but still warranted the findings of fact of the referee; but the

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material facts found by him seem to have been overlooked in his legal conclusions. The referee finds that appellant was born in April, 1853, and married in September, 1869, so that she was, at the date of her marriage, over the age of sixteen years; and he further finds that so far as she "was concerned, the marriage was not procured by force or fraud, but was entered into with her full and free consent."

These findings are conclusive of the case. The appellant being of lawful consenting age to make a marriage contract, and entering into the same "without force or fraud," and "with her full and free consent," did make a valid binding contract, which can only be avoided by her for some reason by law provided for such avoidance; and none such has been presented in this case.

The judgment of the District Court was therefore correct and must be affirmed.

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VIRGINIA AND CARSON CITY RAILROAD—LYON COUNTY RAILROAD BONDS. Where a statute provided for the issuance of the bonds of Lyon County to the Virginia and Truckee Railroad Company, upon its building a first-class railroad from Virginia City to Carson City, running within twelve hundred feet west of Trench's mill in Silver City, (Stats. 1869, 62); *Held*, that the building of a first-class railroad between the cities named, but running twenty-four hundred feet west of Trench's mill, though a branch was built up to within four hundred feet, was not a compliance with the condition of the statute, and would not authorize the issuance of the bonds.

CONTRACT BETWEEN COUNTY AND RAILROAD MADE BY LEGISLATURE. Where the Legislature provided that if a railroad should pass a certain point in a certain county, the county should issue its bonds to the railroad company; *Held*, that the statute framed a contract between the county and the company, and that the county could not be obliged to issue its bonds if the road did not pass the point prescribed.

IMPRACTICABLE CONDITION PRESCRIBED BY STATUTE. Where a statute prescribed that bonds should be issued to a railroad if it should pass a certain point; *Held*, that to entitle the railroad to the bonds it must pass such point, notwithstanding passing such point might prove to be impracticable.

SUBSTANTIAL COMPLIANCE WITH CONDITION PRESCRIBED BY STATUTE. Where a statute prescribed that if a railroad should be built through a certain point in

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a certain county, such county should issue its bonds to the company; *Held*, that though a substantial compliance with the condition would have been sufficient, it was not a substantial compliance for the road not to pass the point prescribed, though it might pass a point more advantageous for the county and though a branch were run to the point prescribed.

STRICT PERFORMANCE OF CONDITIONS PRECEDENT. A condition precedent must be strictly performed in every particular, in order to entitle the party, whose duty it is to perform it, to enforce the contract against the other party.

PRINCIPLE OF STATUTORY CONSTRUCTION. In construing a statute the duty of a Court is to seek the legislative intent and reach the object sought to be expressed; but in so doing the first step is, if possible, to ascertain the intent from the language used, and if that is clear and unambiguous, inquiry stops.

JUDICIAL POWER OVER CONTRACTS. A Court has the power to interpret a contract as between parties before it, but not to make a new one for them.

This was an original application in the Supreme Court for a peremptory writ of mandamus against W. Buncher, W. Byron and J. F. Roney, County Commissioners of Lyon County. The facts are stated in the opinion.

R. S. Mesick, for Petitioner.

I. The terms of the statute have been complied with literally as well as substantially, unless they require the road to pass a line drawn west from Trench's mill and cross that line within twelve hundred feet of the mill. Such a construction cannot be indulged, because the language of the statute is not clear on this point, even if it can be said to have any meaning at all. It is so vague and uncertain that it is necessary to give it a meaning by construction, such as the Legislature may be reasonably supposed to have intended.

The intention clearly was that the road should pass through Lyon County by such route as would most benefit the county, but in as close conformity to the point designated as could reasonably be done. Can it be inferred that the Legislature meant arbitrarily to have the road run within twelve hundred feet of Trench's mill on a line west, or have no road at all? Taking a literal meaning, the words signify nothing pertinent, plain or useful; but when given a reasonable, fair and equitable construction, with reference to the obvious purposes of the law, the acts of the company are a substantial

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compliance with the law, accomplish its purpose, confer the intended benefit upon the county, and entitle the company to the bonds.

II. The precedents by which cases like this are to be determined require that a strict interpretation shall not prevail; but that a rational and equitable one shall be enforced, by which the County shall deliver her bonds, the Court seeing that an equivalent benefit has been conferred upon it in good faith by the company. (7 Barb. 420; Sedgwick on Cons. Sec. 376; 4 Com., 140; 5 Dutcher, 99; 3 B. & Ald. 266; 8 Mees & Wels. 288; 7 Vermont, 739; 13 Pick. 284; 3 Cowen, 85, 96; 3 Wheaton, 541; 11 Wheaton, 361; 2 Met. [Ky.] 56; 7 Mass. 457; 15 Mass. 204.)

Robert M. Clarke, for Respondent.

I. The Legislature had no power to donate the county's bonds or money. Because an individual can donate money to a railroad it does not follow that he can be compelled to do so; nor does it follow because a county can donate its bonds or money that the Legislature can donate them.

II. The statute is to be treated as a contract between the Legislature, acting for Lyon County, and the railroad company. (2 Redfield on Railways, 428, Note 1; 1 Redfield on Railways, 387, note; 45 Maine, 507.) The completion of the road upon a line to pass not more than twelve hundred feet west of Trench's mill is a condition precedent to the issuance of bonds, and must be strictly performed in every particular in order to enable the company to enforce the issuance of the bonds. (Story on Contracts, Sec. 32, p. 29; 3 Pick. 155; 14 Mass. 266; 5 Pick. 395; 8 Cow. 457; 2 Penn. 454; 9 Mass. 78.)

III. It matters not that the condition may be difficult or foolish; for if it be so, it is the fault of the party who engages to perform it, and he should suffer the consequences. (Story on Contracts, Sec. 32; 2 Parsons on Contracts, 184.)

IV. The Legislature has prescribed the condition upon which the bonds are to issue. The Court will declare what that condition is; but will not make new conditions, or make a new contract between the parties.

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V. The intention of the Legislature was manifestly to make Silver City a point or station on the main line between Carson and Virginia. This is not accomplished by the branch road, over which special trains only pass.

By the Court, WHITMAN, J.:

The Legislature of this State in 1869 passed a certain statute, in which, among other things, it is provided that "whenever, within eighteen months from the passage of this Act, the Virginia and Truckee Railroad Company, a corporation existing under the laws of this State, shall have completed the construction of a first class iron railroad from some point within the limits of the city of Virginia to the city of Carson, on the line of a railroad between said cities, which line shall pass a point not more than twelve hundred feet west of Trench's mill, in Silver City, Lyon County, and the same shall be in complete readiness to receive the rolling stock proper therefor, the Board of County Commissioners of Lyon County are hereby authorized and directed to prepare and issue the bonds of said county to the amount of seventy-five thousand dollars, in the form hereinafter specified, and deliver the same to the Virginia and Truckee Railroad Company for its benefit. * *

* * Immediately after being notified by the company of the fulfillment of the conditions upon which the said bonds are to issue as above stated, the Board of County Commissioners shall proceed to satisfy themselves, by personal inspection or otherwise, of the fact of the performance of said condition; and on being so satisfied shall, without delay, prepare, issue and deliver the bonds as above directed." (Stats. 1869, 62.)

Within the prescribed time the company completed its road from Virginia City to Carson City, in a line which passed no point west of Trench's mill in Silver City nearer than twenty-four hundred feet. Within the same time the company built a branch to a point within three or four hundred feet of said mill. The defendants, county commissioners, upon personal inspection of the work decided that the condition of the statute, so far as related to their county, had not been performed, and declined to issue the bonds. This action is to compel them so to do by peremptory writ of mandamus from this Court.

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At first impression this matter is so simple that it would be difficult to suggest any reason for the writ. The Legislature framed a contract between Lyon County and plaintiff, and intrusted the commissioners of that county with a special and restricted power, which was, to issue the bonds of the county to the plaintiff, when upon personal inspection, or otherwise, such commissioners should be satisfied of the fact of the performance of the condition precedent to such issuance, which was the passing a point with the line of plaintiff's railroad from Virginia City to Carson City not more than twelve hundred feet west from Trench's mill in Silver City. The commissioners on personal inspection satisfied themselves that the line of the railroad did not pass within twenty-four hundred feet of that point, and consequently refused to issue the bonds. The proposition seems too clear for argument or discussion.

But counsel for plaintiff claim that the condition has been substantially complied with, and to that end offer evidence to prove that to have built the road on a line passing the point named, would have rendered it an impracticable road for working purposes; in other words, as is claimed, not a first class road; and that the point touched is the nearest practicable point.

There is no question of the rule invoked; and did it appear by the excuse made that the condition had been substantially complied with, that is, that the variance was immaterial, this Court would hold the condition performed. But it is not a substantial compliance with a contract to perform another and different matter, and the fact that to have built the road as directed would have been to ruin it, simply proves that the plaintiff agreed to do something which it either could not do, or deemed it better not to do; but it was bound to do that thing substantially before it could claim any performance from defendants.

A condition precedent "must be strictly performed in every particular in order to entitle the party whose duty it is to perform it to enforce the contract against the other party." (Story on Contracts, Sec. 32.) This is the general rule, and applies with as much force to contracts of the nature of the one at bar, as any other. (*Parker v. Thomas*, 19 Ind. 213; *Chapman et al. v. Mad River & L. E. R. R. Co.*, 6 Ohio, [State] 119; *Middlesex Turn-*

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pike Corporation v. Locke, 8 Mass. 268; *Buffalo C. & N. Y. R. R. Co. v. Potter*, 23 Barb. 21; Redfield on Railways, 64, Sec. 3.)

It is further proved that the present road is of more benefit to the people of Lyon County than if constructed as prescribed; and, therefore, the Court is urged to look beyond the letter of the law and assume that the intention of the Legislature was to benefit the people of Lyon County with railroad privileges, but that it was mistaken as to the precise point which the railroad should touch to accomplish the object, and that the point of passage was really merely incidental to the main object. In other words, to take what counsel agree to have been the evident intention of the legislative body, and carry out that, despite the language of the statute.

The duty of every Court in construing a statute is to seek the legislative intent to reach the object sought to be expressed and accomplished; but in so doing a Court is bound by rules; it cannot go fishing in the minds of its members or the legislative mind to reach the desired end; and the first step is, if possible, to ascertain the intent from the language of a statute, and when that is clear and unambiguous, then enquiry stops, because the law says it shall so stop. (*Lewis v. Doron*, 5 Nev. 400; *Commonwealth v. Fitchburg R. R.*, 8 Cushing, 240.)

Where is the ambiguity in the language under consideration? It is as clear and explicit as possible. It says to plaintiff: If you build your railroad on a line which will pass a certain point, Lyon County shall give you her bonds; if not, not; and that is all there is of it. The argument of counsel upon the trial showed the danger of the course proposed; one suggesting one object, one another; but the answer to all is, that the language of the statute is so plain that he who runs may read, and puts the primary object of the Legislature beyond dispute. That primary object was, to have the plaintiff's road to pass Trench's mill in Silver City on the west, not more than a specified distance therefrom. What ulterior purpose was to be accomplished—whether to accommodate Silver City, or the mills, or to put taxable property in the county—is simply conjectural, and might have been one thing, or it might have been another; but guessing is not, or at least should not be, the business of Courts. Had plaintiff built its road through the center of Lyon

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County it would perhaps have accommodated more persons than at present ; but would that have been a substantial compliance with the statute ? No more than if a contractor who had been engaged to build one a wooden house should erect a stone one, and endeavor to force it upon his employer on the plea that it was better in every respect than the one bargained for.

That was not the contract, would be the answer ; you are a volunteer. And so here, the plaintiff did not fulfill its contract, but volunteered to do something else. The defendants, if private parties with full natural powers, could refuse acceptance ; as special agents, they have no option but to do so. (*City of Aurora et al. v. West et al.*, 22 Ind. 88.)

The whole question involved is, whether building a railroad twenty-four hundred feet from an object named is a substantial compliance with a direction or agreement to build it not more than twelve hundred feet therefrom.

It takes no great amount of law or logic to solve the problem. Of course it is no such compliance, and all suggestions of impracticability of compliance or additional benefit from the deviation are beside the point. The matter stands as if the Legislature had said to plaintiff: If you, in building your road from Virginia City to Carson City, can pass a certain point, still keeping your road first-class, you shall have seventy-five thousand dollars in Lyon County bonds ; if not, then you must go without them. The plaintiff failed to make the connection, and must consequently fail to receive the money.

For the commissioners to have taken any other view would have been to exceed their powers. For this Court to do as asked by plaintiff would be not to interpret a contract, but to make a new one. No Court has any such power.

The application for the peremptory writ is denied, and the proceeding dismissed at plaintiff's costs.

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STATE OF NEVADA *EX REL. JOHN BUCKLEY v. ABRAHAM CURRY et al.*

TOLL ON CARSON CITY AND EMPIRE MACADAMIZED ROAD. Where a toll road franchise between Carson City and Empire, granted in 1864, was by judicial action in May, 1865, declared forfeited; and in June, 1865, the holder sought to acquire the right to collect tolls on it by a compliance with the general Act of March, 1865, relating to toll roads, (Stats. 1864-5, 254): *Held*, that as the statute provided that no toll road constructed under its provisions, or otherwise, should "interfere with any road or highway in general use by the traveling public," no right could, in that maner, be acquired to collect such tolls.

EFFECT OF FORFEITURE OF TOLL ROAD FRANCHISE. Under the provisions of section seven of the Act concerning toll roads, (Stats. 1864-5, 254) where the franchise of a toll road, previously granted, became or was judicially declared forfeited: *Held*, that the road became the property of the county, and that, if the county commissioners took no action for the collection of tolls, it became a free highway.

This was an information filed in the Supreme Court on May 16th, 1870, against Abraham Curry and P. H. Clayton, his assignee in bankruptcy, alleging the illegal erection of a toll gate, and the collection of tolls on a public highway, running from Carson City, by the way of "Curry's Warm Springs," to Empire City; all in Ormsby County. It appears that Curry collected tolls on the road till he was adjudged a bankrupt, in September, 1867; after which time P. H. Clayton, his assignee, assumed as such assignee to exercise the franchise.

Defendant put in an answer, claiming to have a right to collect the tolls by virtue of a compliance with the Act concerning toll roads of March 8th, 1865, to which answer relator demurred.

R. M. Clarke, A. C. Ellis and T. D. Edwards, for Relator.

P. H. Clayton, for Respondent.

I. The decision of the Supreme Court (1 Nev. 251) only declared a forfeiture of the franchise, and affirmative action on the part of the county commissioners was indispensably necessary to determine the subsequent status of the road. They had the right to declare the road free, or to continue the collection of tolls. From anything that appears, they may have authorized Curry to keep the road in good traveling condition and to collect tolls thereon.

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II. The object and intent of section twelve of the Act concerning toll roads was to prevent appropriation as a toll road of any road which had been constructed by any county, or by the people living adjacent to such road, or by emigrants; in short, to prevent the use of roads established and constructed at the expense of the people for private gain and advantage. The road in question was in no sense at the date of the passage of the act "a road or highway in *general use* by the traveling public." It was a road passed over only by such persons as paid the tolls demanded by the builder and maintainer. It was not a free public road, such as the act contemplated should not be interfered with by the location of a toll road thereon.

By the Court, LEWIS, C. J. :

By an Act of the Legislature of the Territory of Nevada, approved February 9th, A. D. 1864, the defendant Abraham Curry and his associates were authorized to construct a macadamized road between Carson City and Empire, and after its completion to collect tolls from all persons traveling over it. Claiming that he had constructed such road as the law required, Curry collected tolls as authorized by the Act; but in the month of May, A. D. 1865, the franchise thus claimed by him was declared forfeited by this Court. On the third day of June following, however, he sought to maintain his privilege of collecting tolls by complying with the requirements of an Act of the Legislature, entitled "An Act to provide for constructing and maintaining Toll Roads and Bridges in the State of Nevada," approved March 8th, 1865. (See Statutes of 1864-5, 254.) Section twelve of that law declares that "no toll road, constructed under the provisions of this Act, nor otherwise, shall interfere with any road or highway now in general use by the traveling public or the emigration from the East."

It is quite clear, if at the time Curry endeavored to secure the road by virtue of the provisions of this last Act, it was a "road or highway" in general use by the "traveling public," it could not be taken under this law. That it was so can scarcely admit of doubt. On the thirty-first day of May, Curry was deprived of his franchise, the Court holding that he had not complied with the law

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granting it, and consequently that he never acquired the right to collect tolls. (1 Nev. 251.) Thereupon the road either became a general public highway, or by virtue of section seven of the same law it became the property of the county. In either case, Curry had no right to continue the collection of the tolls. That section declares that "upon the expiration or forfeiture of any toll-road franchise, the ownership, with all the rights and privileges, shall vest in the county or counties in which it is located, and the county commissioners may declare it a free highway, or they may collect tolls on such roads to keep them in good repair."

For a period of three days at least—that is, between the time of the forfeiture of the charter and the third day of June—this road was the property of the county, and whether any tolls whatever should be collected on it or it should be a free highway, was a matter resting entirely with the county commissioners of Ormsby County; but they never authorized the collection of tolls on it, therefore it must be held that they intended to leave it a free highway. However, if that had been done by them it would not help the defendant here; for he does not attempt to justify by any right in or derived from the county, but claims the privilege in himself by virtue of compliance with the provisions of the Act already referred to. Under that Act, as we have shown, he acquired no right, therefore the collection of tolls by him is unauthorized. Judgment of ouster must be entered.

W. S. HOBART, RESPONDENT, v. PATRICK FORD, APPELLANT.

ACT OF CONGRESS AS TO WATER RIGHTS OVER PUBLIC LAND. The Act of Congress (14 Statutes at Large, 253, Sec. 9) gives—as clearly as Acts of Congress usually express their objects—a right of way over public lands to all who may desire to construct ditches or canals for mining or agricultural purposes.

RIGHT UNDER LAW OTHER THAN LAW SPECIALLY RELIED ON. Where a plaintiff attempted to construct a flume for mining purposes over certain public land, and being prevented by the person in possession, brought an injunction suit to prevent such person's further resistance: *Held*, that though plaintiff claimed the right of way to construct his flume under the State law, he was not by such claim prevented from relying also upon the Act of Congress giving such right, the facts pleaded being sufficient to bring him within the Act.

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RIGHT OF WAY OVER PUBLIC LAND WITHOUT COMPENSATION. Under the Act of Congress giving the right of way over public land for mining or agricultural ditches or canals, (14 Statutes at Large, 253, Sec. 9) there is no question of taking private property either for public or private use—the land being public land the Government has the absolute control over it.

DISCRETION IN GRANTING PRELIMINARY INJUNCTIONS—PRACTICE ON APPEAL. The granting of a preliminary injunction by a District Court is very much a matter of discretion, and when it is granted on a complaint exhibiting a *prima facie* case, and there is no answer put in, and no showing made that any defense on the merits exists, the order will not be disturbed.

APPEAL from the District Court of the First Judicial District, Storey County.

It appears from the complaint that the plaintiff in constructing the "Seven-Mile Cañon Flume," from near the Mariposa quartz mill in Storey County to certain points in Lyon County, found it necessary to carry it over certain public land, near Booth's quartz mill in Storey County, in the possession of the defendant; that he proceeded under the State law to condemn the right of way, and had appraisers appointed, who valued it at \$500; that he had tendered that sum to defendant, who refused to accept it; and that after such tender plaintiff attempted to carry forward his work, but was prevented by defendant. The plaintiff therefore prayed for an injunction, restraining the defendant from further interfering with the work.

The Court below, after hearing testimony, ordered a preliminary injunction to issue, and it is from that order that this appeal by defendant is taken.

R. S. Mesick and Williams & Bizler, for Appellant.

I. The injunction should not have been granted, because plaintiff never had possession, and the effect of the order is to transfer possession without trial of the right. (*Bensley v. Mountain Lake Water Co.*, 13 Cal. 313; *Decklyn v. Davis*, Hopkins' Ch. 135; *Lansing v. North River Steamboat Co.*, 7 Johns' Ch. 162; Hilliard on Injunctions, 294, 303.)

II. The Statute of 1866 purports to confer the right of taking private property for private uses, and is therefore unconstitutional.

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The use actually intended to be made of the easement or ground claimed is in no sense a public one. (*Gibson v. Mason*, 5 Nev. 283; *Gillan v. Hutchinson*, 16 Cal. 155; *Gilmer v. Lime Point*, 18 Cal. 251; *Bloodgood v. Mohawk R. R. Co.*, 18 Wend. 13; *Taylor v. Porter*, 4 Hill, 143; *Embury v. Connor*, 3 Comst. 516.)

III. Plaintiff is not helped by section nine of the Act of Congress, because as his complaint predicates his right solely upon the State statute, he is precluded from claiming under any other source of title. Not having pleaded the Act or any right derived under it, he cannot excuse himself for doing what would otherwise be a plain trespass. Nor has he brought himself within the provisions of that Act. (*Dye v. Dye*, 11 Cal. 168; *Zabriskie Land Laws*, 241; *Lentz v. Victor*, 17 Cal. 274; *American Co. v. Bradford*, 27 Cal. 367; 35 Cal. 441; *Boyce v. Boyce*, 7 Barb. 88; 1 Chitty Pl., 501, 371; 15 Wend. 338; 1 Cow. 239.)

Hillyer, Wood & Deal, for Respondent.

I. The right of way for the construction is given by the Act of Congress. The intention is manifest. Appropriations of water are first protected. The right of way is there given for constructing the artificial conduits through which the water is conducted for mining, agricultural, manufacturing and other purposes. And the proviso makes it certain that this is a grant for future constructions as well as a confirmation of past, and allows the settler to collect damages because he is being deprived by the law of the power to prevent the construction.

II. Plaintiff also complied with the provisions of the State Act of 1866. This Act is constitutional, and will be presumed so until the contrary is clearly shown. (*Gibson v. Mason*, 5 Nev. 283; *Sedgwick on Con. Law*, 482.) It is the exclusive province of the Legislature to determine whether a use which may be beneficial to the public is so far public as to authorize private property to be taken. (*Sedgwick on Con. Law*, 512; 4 Pick. 463; 24 Barb. 665; 7 Greenleaf, 292.)

In a State like ours, the diversion of water from its natural channel and its distribution over the country for mining, irrigation, man-

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ufacturing and milling, is an imperious public necessity, and the taking of private property to effect this is a taking for public use within the meaning of that term as used in the Constitution. (*Gibson v. Mason*, 5 Nev. 283; 12 Pick. 467; 8 Blackford, 266; 19 Barbour, 166; 3 Paige's Ch. 71.)

III. Plaintiff's right is a right to an easement, and an obstruction of such a right will be prevented by injunction. (2 Metcalf's Ky. 98.)

By the Court, LEWIS, C. J.:

"Sec. 9. *And be it further enacted*, that whenever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, that the same are recognized and acknowledged by the local customs, laws and the decisions of the Courts, the possessors and owners of such vested rights shall be maintained and protected in the same, and the right of way for the construction of ditches and canals, for the purposes aforesaid, is hereby acknowledged and confirmed: *Provided, however*, that whenever after the passage of this Act any person or persons shall in the construction of any ditch or canal, injure or damage the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

This section, which by its turbid style and grammatical solecisms, more surely than by the enacting clause of the Act, is shown to be a production of Congress, may be found on page 253, Vol. 14, of the Statutes at Large.

In its adoption there appear to have been three distinct objects in view: first, the confirmation of all existing water rights; second, to grant the right of way over the public land to persons desiring to construct flumes or canals for mining or manufacturing purposes; and third, to authorize the recovery of damage by settlers on such land against persons constructing such ditches or canals for injuries occasioned thereby. That this section grants the right of way over the public land to all who may desire to construct ditches or canals for mining or agricultural purposes, is about as clear and

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certain as the objects and purposes of the Acts of Congress usually are. It is true, the most apt words to indicate this purpose are not employed. That could scarcely be expected; but the right of way for the construction being "acknowledged" and confirmed indicates the grant of a new right, rather than the confirmation of an old one, enjoyed at the time of the passage of the Act. The confirmation or recognition of existing rights seems to be the object sought to be accomplished by the first clause of the section: to hold that the second clause simply reiterates the same thing might be warranted by the practice of Congress, but not by the rules of construction which must govern the Courts in the interpretation of all laws. Again, the last provision of the section strengthens the view that such right of way is granted, for it authorizes the recovery of damages by the settlers on the public land for injuries resulting from the construction of ditches and canals *after the passage of the Act*.

It is argued, however, that the privilege thus granted is not available in this case, because:

1st. The plaintiff pleads and relies on a statute of this State for the right claimed by him, and:

2d. Sufficient facts are not alleged to bring him within the Act of Congress.

Undoubtedly, the plaintiff claims the right to construct his flume from the law of 1866 enacted by the State Legislature, and pleads all the facts necessary to bring him within its provisions: so also all the facts necessary to bring him within the Act of Congress are pleaded. Under that Act, as we understand it, nothing is necessary to be shown except that the construction of a canal or ditch is desired for some mining or agricultural purpose, and that the land over which it is to be constructed is public. These facts are shown in the complaint alleging the building of the ditch or flume for certain mining purposes, that the land claimed by the defendant is public land, that it is necessary to construct the ditch over it; and that he unlawfully obstructs and prevents its construction over the premises claimed by him. Surely, nothing further is required. All the facts necessary to bring him within either law being pleaded, there appears to be no better reason for holding that he is confined

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to the rights given under the State law than that he is to those granted by the Act of Congress. Being public laws, it was not necessary to refer to either of them, but only to plead the facts. This is done, and therefore the plaintiff is entitled to the rights given by either. There is not under this law any question of taking private property either for a public or private use. The land claimed by Ford is public land, over which the General Government has absolute control. It has, as we interpret this law, authorized any person wishing to construct a canal or ditch for mining or agricultural purposes to construct it over any public land; this claimed by Ford being public, the plaintiff has the right to pass over it with his flume.

It is not the intention here to determine whether the plaintiff has the right to divert the water or tailings from the defendant's premises. He has not answered, nor is it shown that he has the right to the water or tailings claimed by him as against the plaintiff. If he has not, then certainly the plaintiff has not only the right to construct his flume, but also to divert the water and tailings. If however, on the other hand, the defendant has the better right, then as a matter of course the plaintiff could have no right to cause the diversion of water from him. This is a question not determined in this proceeding; but the plaintiff seems to have made out a *prima facie* case by his complaint and upon the hearing of the application, to entitle him to the order made in his favor. At least, as the granting of these preliminary orders rests very much in the discretion of the Court below, we would not feel authorized in reversing its action upon the showing made, especially as no answer is filed, and it is not known that any defense to the merits exists.

If Ford had the title to the land here in question, we are inclined to believe with counsel that an order of this kind, which in effect places the plaintiff in possession of a portion of it, ought not to be granted, for it would be ejecting the owner before the trial of the right. Here however, it is admitted that the land is public; that being the case, Congress had a perfect right to grant the right of way over it: having done so, Ford has no more right to complain than a person who had never been in the possession.

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Entertaining these views, we do not feel justified in reversing the preliminary injunction granted by the Judge below ; it is therefore affirmed.

JOHNSON, J., did not participate in the foregoing decision.

IRA PROCTOR, RESPONDENT, v. GEORGE JENNINGS,
APPELLANT.

WATER RIGHTS—OBSTRUCTIONS HARMLESS WHEN ERECTED. A dam erected on a stream in a manner in no wise injurious or prejudicial at the time of its erection to a mill above, but which, by reason of circumstances that could not have been anticipated happening subsequently and operating in connection with it, causes the water to flow back upon the mill, is not such an obstruction as to authorize its abatement or justify a recovery of damages against the person building it.

RIGHTS OF SUBSEQUENT APPROPRIATORS OF WATER. A person appropriating a water right on a stream already partly appropriated acquires a right to the surplus or residuum he appropriates ; and those who acquired prior rights, whether above or below him on the stream, can in no way change or extend their use of water to his prejudice, but are limited to the rights enjoyed by them when he secured his.

FORTUITOUS INJURIES TO WATER RIGHTS. Where a dam was erected on a stream below another's mill, and so as not at the time to interfere with it, but subsequently, on account of a new process of mining going into operation on the stream above, extraordinary quantities of sediment were deposited so as with the dam to interfere with the mill above : *Held*, that as the injuries resulting to the mill were not occasioned immediately by the dam, but by unforeseen and fortuitous circumstances happening afterward, though acting in connection with it, the owner of the dam was not responsible.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts are fully stated in the opinion.

Hillyer, Wood & Deal, for Appellant.

I. The defendant so using the water after it had passed plaintiff's mill as not to interfere with plaintiff's rights, became as to that use the prior appropriator, and the rights of the parties could not be

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changed by any subsequent act of plaintiff, or any other person. (*Cary v. Daniels*, 8 Met. [Mass.] 478; *McKenney v. Smith*, 21 Cal. 374.)

II. Defendant has made no change in the extent of his appropriation, nor in the mode of using the water. The rights of the plaintiff and defendant to the use of the water were fixed when defendant made his appropriation. (*Ophir S. M. Co. v. Carpenter*, 4 Nev. 534; *Loddell v. Simpson*, 2 Nev. 276; *Ortman v. Dixon*, 13 Cal. 481.)

III. Although the Court cannot decide in this case as between the miners spoken of in the findings and plaintiff, it will not hold defendant responsible for injuries done to plaintiff by the acts of those miners.

Henry K. Mitchell, for Respondent.

I. The rights of plaintiff extended not only to the unobstructed use of his wheel, but also to have the channel of the stream remain in the same condition it was in at the time of the construction of defendant's dam. If the construction of the dam in any manner raised the level of the bed of the stream, or in any manner interfered with or changed the flow of the stream at the time of its construction, it was an infringement upon plaintiff's rights, for which he is entitled to relief. (*McAlmont v. Whittaker*, 3 Rawle, 84; *Hill v. Ward*, 2 Gil. [Ill.] 285; Angell on Water Courses, 5th ed., Secs. 340, *et seq.*; *Bell v. McClintock*, 9 Watts, 119; *Lehigh Bridge Co. v. Lehigh Nav. Co.*, 4 Rawle, 9.)

II. In the absence of a finding determining whether the rights of the miners above are prior or subsequent to plaintiff, or prior or subsequent to defendant, it is to be presumed that those persons exercised their legal rights, and did not transcend them.

III. The debris and sediment flowing down the natural stream passes by the wheel of plaintiff without retarding or impeding its revolutions, and over the land of plaintiff until its further flow is prevented by the dam of defendant, which causes the obstruction

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and injury. The dam is the proximate cause of the wrongs complained of.

IV. The claim that the mode of working a mining claim as to subsequent appropriations shall be confined to the particular manner of working at the time of the subsequent appropriation is untenable. Such a doctrine would have confined all mining pursuits in the early history of California to the rocker: a theory too narrow for justice, and dangerous in its results.

By the Court, LEWIS, C. J.:

1st. "In the year 1865, the plaintiff constructed a water mill upon Six Mile Cañon, the motive power of the same being the water of the stream of said cañon, conducted therefrom by a ditch leading from a point above the mill to the said water wheel. After passing over said wheel, the water fell into the channel of said stream and passed on down the same, there being sufficient fall from the bottom of the wheel to the channel, and from there down sufficient grade to the channel, to enable the water leaving the wheel to pass off freely and without obstructing the working of the same. As to the defendant, the plaintiff was the prior appropriator of the water privilege to the extent above mentioned, and he has since done nothing by which he has lost any of the rights so acquired, or diminished their extent.

2d. "Subsequently to the acquisition of plaintiff's rights, and in October, 1867, the defendant constructed a dam across the channel of said stream, at a point about 155 feet below the wheel of plaintiff, and below and east of the east line of plaintiff's land, together with a waste way, flume and ditch, for the purpose of furnishing water power for certain works of defendant below. At the time of constructing said dam, the defendant was fully apprised of the prior rights of plaintiff, and was expressly notified by him not to obstruct the same in any manner to interfere with those rights.

3d. "The effect of the construction of defendant's dam was to cause the sediment coming down said stream to gather above the dam to the level of the bottom of the ditch leading from the same, and to cause the water of the stream to set back towards plaintiff's wheel, upon the same level, and thus diminish very materially

the grade of the channel below said wheel. But at the time of its construction it did not so back the water or sediment, or diminish the grade as to prevent the free flow of the water from plaintiff's wheel, and did not at all interfere with the working of the same.

4th. "The dam so constructed by defendant has not since been altered in height, and there has been no alteration of the level or altitude of the flume and ditch leading from the same. During the latter part of the year 1867, the whole of the year 1868, and up to the — day of June, 1869, the works of defendant below did not in any manner obstruct or interfere with the free flow of the water from plaintiff's wheel, which was in use during all said period, or in any manner obstruct or interfere with the working of said wheel; and had the waters of said stream continued to flow down to the said works of plaintiff and defendant in their natural state and condition in which they did run and flow down to the same at the time of defendant's appropriation, and during the period aforesaid up to the — day of June, 1869, the said works of defendant would not materially have interfered with the workings of plaintiff's wheel, or the free flow of the water therefrom.

5th. "About the — day of June, 1869, certain parties who were in the possession of mining claims along the channel of said stream above the works of both plaintiff and defendant, adopted a new mode of working their claims and of using the waters of the stream in the working thereof. They had theretofore so used the waters as to permit the same to flow down naturally and regularly, and the change consisted in penning the water up for longer or shorter periods in reservoirs constructed for that purpose, and then permitting the same to escape suddenly and in large quantities, and pass down the stream with a flood. The effect of this was to carry down by the power of the floods of water so discharged, large amounts of tailings and sediment collected in said reservoirs and lying in the channel of said stream to the works of defendant, and thereby fill up his dam above the ordinary level of discharge, and to cause the same to accumulate in masses above said works as far back as the wheel of plaintiff, and to cause the back water and sediment to obstruct the free flow of water from the wheel of plaintiff, and prevent the regular and efficient working thereof.

6th. "Had it not been for the acts above mentioned, the works of defendant would not have materially interfered with the working of plaintiff's wheel; and on the other hand, had it not been for the works of the defendant the acts of said miners would have done no injury to the plaintiff; and the grade of the channel below said wheel, if left in the condition in which it was prior to the construction of defendant's dam and ditch, would have been sufficient to discharge freely all the water and sediment coming down said stream, notwithstanding the irregular flow thereof."

Upon these facts found by the Court below, a decree was rendered enjoining the defendant from continuing his dam at such a height as in any manner to interfere with or retard the revolutions or workings of the plaintiff's water-wheel attached to the mill and buildings mentioned in the complaint. The defendant appeals.

But one question is presented by the record, or need be considered by the Court, namely: Can a dam erected on a stream in a manner in no wise injurious or prejudicial at the time of its erection to a mill owner above, but which by reason of circumstances happening subsequently, and which could not have been anticipated at the time, operating in connection with it, and so causing the water to flow back upon the mill above, be held such obstruction as to authorize its abatement, or justify a recovery of damages against the person so building the dam for injury thus occasioned? We think not. Priority of appropriation, where no other title exists, undoubtedly gives the better right. And the rights of all subsequent appropriators are subject to his who is first in time. But others coming on the stream subsequently may appropriate and acquire a right to the surplus or residuum, so the rights of each successive person appropriating water from a stream are subordinate to all those previously acquired, and the rights of each are to be determined by the condition of things at the time he makes his appropriation. So far is this rule carried that those who were prior to him can in no way change or extend their use to his prejudice, but are limited to the rights enjoyed by them when he secured his. Nor has any one the right to do anything which will in the natural or probable course of things curtail or interfere with the prior acquired rights of those either above or below him on the same stream.

The subsequent appropriator only acquires what has not been secured by those prior to him in time. But what he does thus secure is as absolute and perfect and free from any right of others to interfere with it, as the rights of those before him are secure from interference by him. Upon what principle, then, can it be held that he is responsible for injuries resulting to the prior appropriators, occasioned not immediately by his acts of appropriation, but by unforeseen and fortuitous circumstances happening after his appropriation, and acting in connection with the means employed by him to appropriate the surplus water?

Here the defendant had the undoubted right to make use of all the water flowing from the plaintiff's mill, and to build a dam or employ any other means of appropriation not prejudicial to the rights of the plaintiff. But at the time Jennings built his dam, it did not in any way interfere with the right of Proctor, nor is it claimed that in the ordinary course of things it would have done so, or that it could have been anticipated that the immediate cause of the injury would have occurred. Under such circumstances, the law we think does not hold the defendant liable, nor adjudge his dam such an obstruction or nuisance as may be abated.

The Inhabitants of China v. Southwick et als., 3 Fairfield, 238, was an action on the case brought to recover damages for an injury done to the plaintiffs' bridge at the head of Twelve-Mile pond, raised as it was alleged by the defendants at the outlet of the pond. It appeared that the defendant built the dam at the point designated, and thereby raised a head of water, but not so high as to flow or injure the bridge of plaintiffs. Afterwards, however, by heavy rains and a violent storm of wind the waters were thrown upon the bridge, and it was destroyed. The Court held the defendant not liable, saying: "The jury found that the head of water raised by the defendants' dam was not, at the period complained of, high enough to flow the plaintiffs' bridge or do damage thereto. Its erection, then, was a lawful act, not in itself calculated to do any injury to the plaintiffs. Their loss was occasioned, as the jury have found, by great rains, or by the violence of the wind. If the dam had not raised the water to a certain height, the rain or the wind superadded might not have done the damage. It may

have been one, then, of a series of causes to which the injury may be indirectly ascribed. Their connection, however, was fortuitous, and resulted from an extraordinary and unusual state of things. Neither the rain nor the wind was caused by the dam. The bridge had continued unimpaired for a series of years, while the dam was higher than it was when the bridge was carried away. Such an event could not, therefore, have been reasonably calculated upon or foreseen. It would be carrying the doctrine of liability to a most unreasonable length to run up a succession of causes and hold each responsible for what followed, especially where the connection was casual and unexpected as it was here, and where that which is attempted to be charged was in itself innocent. The law gives no encouragement to speculations of this sort. It rejects them at once. Hence, the legal maxim: *Causa propinqua non remota spectatur* * * * If there had been no dam, the injury might not have happened; but the defendant had the right to erect it, and that without being held answerable for remote and unforeseen causes."

Again, the same rule is thus laid down in *Bell v. McClintock*, 9 Watts, 119: "When the plaintiff erected his dam, he was bound to notice not only its effects at the time, but its effects at all seasons as well. In this stream as well as all other large streams which fall into the Alleghany river, there are regular freshets or floods which swell the volume of water, and thereby enable the inhabitants to raft down the river the various products of the country. They are expected with considerable certainty at fixed times and seasons. It was the duty of the plaintiff with reference to this, which is at least of yearly occurrence, to calculate the immediate probable effects the dam would have at all seasons of the year on the property of his neighbors above as well as below his erection. A neglect to use the necessary precaution, or a miscalculation of its effects, where it works an injury to another, may be compensated in damages. *But where the injury arises from some cause out of the ordinary course, from some unusual cause, as for instance, from a flood or freshet such as has been described by the witnesses, the owner of the dam is not liable to damages. It is damnum absque injuria.* They are not such accidents as ordinary foresight or pru-

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dence can guard against, and for this reason a distinction has been taken as to the liability of the party." (See also Angell on Water Courses, Sec. 347, *et seq.*)

By the rule adopted in these cases, which seems not only a correct but just one, it was incumbent on the defendant to so erect his dam that it would do no injury to the plaintiff, either under the then existing circumstances, or such as might be anticipated to happen in the future; but he was not required to go further, nor where he has used such precaution is he liable for injuries resulting from causes which could not be foreseen in conjunction with his dam. Such is the result of the rule when applied to this case.

That he could not have foreseen or anticipated the new mode of working the mines above himself and plaintiff is a self-evident proposition, if as found by the Court below it were in fact a new process.

The decree must be vacated. It is so ordered.

WILLIAM McDONOUGH, RESPONDENT, v. THE MAYOR AND ALDERMEN OF VIRGINIA CITY, APPELLANTS.

VIRGINIA CITY CHARTER — OPENING AND REPAIRING STREETS. The provision of the charter of Virginia City, that the "board of aldermen shall have power" to open streets, improve them, and keep sidewalks in repair, gives a permissive power only, and does not impose the duty upon the city to do these things.

CARE REQUIRED OF MUNICIPAL CORPORATIONS IN MAKING IMPROVEMENTS. Though it is not incumbent upon the City of Virginia, under its charter, to open streets or keep the sidewalks in repair, yet if it undertake to do so, the act must be done with the same degree of care for the rights and personal safety of individuals, which natural persons are required to exercise under similar circumstances.

VIRGINIA CITY NOT OBLIGED TO REPAIR STREETS. The charter of Virginia City in express terms leaves the matter of repairing the streets discretionary with the authorities, as it does the opening of them in the first instance; and consequently the city cannot be held liable for a refusal to repair a street after it has once been properly opened and put in good condition.

VIRGINIA CITY, WHEN RESPONSIBLE FOR DEFECTS IN STREETS. Though Virginia City, under its charter, is not obliged to open a street, nor to repair one after it is opened, yet if a street, when opened, is left in such a defective condition that injuries result therefrom to persons exercising proper care, the city is liable therefor.

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APPEAL from the District Court of the First Judicial District, Storey County.

It appears that on the night of December 15th, 1868, C street in Virginia City, at the intersection of Flowery street, was so much out of order that there was nothing to protect a person unfamiliar with the streets, in a dark night, from falling a distance of three feet; and that plaintiff, who had recently become a resident of the city, in passing along the street on that night, which was dark, fell that distance and broke his right leg at the ankle. Having instituted this suit in the Court below, he recovered a verdict for two thousand dollars. A motion for new trial by defendants having been denied, they appealed.

J. W. Whitcher, for Appellants.

The municipal corporation is not liable under the charter for damages sustained by any one by reason of imperfectly constructed sidewalks. So held in 32 Barbour, 634, and 36 Barbour, 226, the New York statute referred to in them being substantially identical with ours.

R. H. Taylor, for Respondent.

I. Virginia City has power to lay out and repair public streets, and to provide for the construction, repair and preservation of sidewalks, (Statutes of 1866, 90, Sec. 17) and this amounts to an obligation to keep the streets in repair. (*Mayor, &c., of New York v. Furze*, 3 Hill, 612; *Hutson v. Mayor, &c.*, 5 Seld. 163.)

II. When streets are negligently suffered to become and remain out of repair, the corporation is liable, if the party injured exercises ordinary care. (*Griffin v. Mayor, &c., of New York*, 5 Seld. 461; *Mayor &c. of New York v. Bailey*, 2 Denio, 434.)

III. Whether negligence existed in a particular case is a fact for the jury. The jury in this action having found upon that issue, the Court should not interfere with the verdict. (*Richmond v. Sacramento Valley R. R.*, 18 Cal. 358; *Beers v. Housatonic R. R. Co.*, 19 Conn. 566; *Munroe v. Leach*, 7 Met. 274.)

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By the Court, LEWIS, C. J. :

This action is instituted by the plaintiff to recover damages for personal injuries alleged to have been sustained by him, occasioned by a fall or pitch at the intersection of two of the public streets of the City of Virginia. The complaint assumes that it is the duty of the defendant to keep its streets in repair and good condition, and charges that the injuries suffered by the plaintiff were caused by its neglect to perform this duty.

The defendant interposed a general demurrer, which being overruled, it subsequently answered. The trial resulted in favor of the plaintiff. Upon this appeal, it is again argued that the complaint does not state a cause of action : because it is said the charter of the city, or rather law incorporating it, does not absolutely impose the duty upon the authorities, either to open the streets, or to keep them in repair when opened. That portion of the law touching this question, declares that the "board of aldermen shall have power * * to lay out, extend and alter the streets and alleys, provide for the grading, draining, cleaning, widening, lighting or otherwise improving the same ; also, to provide for the construction, repair and preservation of sidewalks, bridges, drains and sewers, and for the prevention and removal of obstacles from the streets and sidewalks."

The language conferring this power, it will be observed, is simply permissive. It does not impose the duty upon the city to do these things. To open streets, improve them, and to keep the sidewalks in repair, are matters discretionary—left entirely to the option of the city. "The board of aldermen shall have power," cannot be construed to be an imposition of an absolute duty which is to be performed *nolens volens* by the city corporate authorities. Here the power to do the acts is unquestionably conferred ; but to confer a power is one thing, to order it to be exercised is an entirely different thing. There is nothing in the language quoted, nor in the context of the Act, imposing the exercise of this power upon the board of aldermen as a duty. The law, as we interpret it, leaves it optional or discretionary with the corporate authorities whether they will exercise these powers or not. Such is the interpretation

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placed upon similar laws, or charters, in other States. (*Wilson v. The Mayor &c. of New York*, 1 Denio, 595; *Mills v. City of Brooklyn*, 32 N. Y. 489.)

But although it is thus left optional with the city to open streets and to keep the sidewalks in repair, still if it undertake to do it, the act must be done with that degree of care for the rights and personal safety of individuals which natural persons are required to exercise under similar circumstances. It may not, for example, be incumbent on an individual to build a sidewalk; but it will not be doubted if he should attempt it and perform the work in a manner dangerous to persons using it, and injury should be the result therefrom, that he would be liable in damages. So with a municipal corporation: even when it is not incumbent on it to do work, still if it undertake its performance, it must not do it in a manner careless of the personal safety of the citizen.

The law upon this head is thus well and clearly stated in the case of *Lacour v. The Mayor &c. of New York City*, 3 Duer, 406: "The point involved in the present case was expressly decided in the case of the Rochester White Lead Company above cited, in which the distinction between judicial or discretionary duties and those purely ministerial was clearly taken. Up to the point at which a duty ceases to be one of the former description, a public officer is not amenable to an individual in a civil action for the exercise, or the refusal or neglect to exercise the duty; but the moment the duty ceases to be of this character, which it does when the election to perform is made, this immunity also ceases." The execution of the work itself is purely ministerial, and thenceforth the public officer becomes subject to the same rules which govern the liabilities of private individuals, and like them is liable in damages for the improper or negligent exercise of the duty. Thus, the ordinance of a city or municipal corporation directing a public improvement to be made is the exercise of a purely judicial or discretionary function, and for such exercise the corporation is not liable in a civil action; but the prosecution of the work itself—the carrying of the improvements into execution—is ministerial in its character, and the corporation is bound to see that it is done in a proper manner, or like an individual, it will be responsible in damages."

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The case of the *Rochester White Lead Company v. The City of Rochester*, 3 Comstock, 463, is also directly in point here. The plaintiff brought suit against the defendant for damages occasioned by the unskillful building of a culvert by the agents of the city, whereby the water was set back upon the premises of the plaintiff. The charter of the City of Rochester provided that "it should have power to cause common sewers, drains, vaults and bridges to be made in any part of the city"—thus, it will be seen, leaving it discretionary with the authorities to make these improvements or not; but the Court held that having undertaken to execute the power, the law held it responsible for any damages resulting from its negligent performance, and affirmed the judgment below, which was for the plaintiff.

The following language, employed by Chief Justice Nelson in the case of the *Mayor etc. of New York v. Furze*, 3 Hill, 612, has been repeatedly adopted as correctly declaring the law, although other portions of his opinion have been disapproved: "But, independent of this principle, the duty which the defendants are charged with neglecting is quite obvious in another view. The sewers in question were constructed by the corporation under the power conferred by the section of the statute already mentioned. If, therefore, we concede that the execution of the power was in the first instance optional on the part of the corporation, yet having elected to act under it, they must be held responsible for a complete and perfect execution."

In this last case it was held that the City of New York, having opened sewers, was bound to keep them in good condition; for, says the Chief Justice, "It would be highly unjust to allow that after constructing these works the corporation might refuse to keep them in repair, and thus leave the streets in which they have been placed in a worse condition than before they were put there." Will the same rule apply to the City of Virginia with respect to the streets? No: because the law in express terms leaves the matter of repairing the streets discretionary with the authorities, as it does the opening of streets in the first instance. Had the law simply provided that the streets might be opened, then the rule would apply here; but their having gone further and left the repairing and keep-

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ing in order discretionary, it cannot be held that the city is liable for a refusal to repair a street which, in the first instance, was properly opened and put in good condition. It is, like an individual under like circumstances, liable, not for what it does not do, but for what it does in a careless and negligent manner. (*Mills v. The City of Brooklyn*, 32 N. Y. 489.) If the defect in the street where the plaintiff received his injuries was not the result of wear and tear, but it was left in that condition by the authorities when they opened the street, then the city is liable for injuries resulting therefrom to those exercising proper care. But if the street was, when opened, put in good condition, and the defect occurred afterwards, but not by the direct act of the defendant, it is not liable.

It is manifest from what is said that it is necessary for the plaintiff to allege and prove that the street where the injuries resulted was opened by the city, and that the pitch or defect was made by it, or that it was left in that condition when the street was opened. These facts are not alleged in the complaint, nor were they proven at the trial.

The judgment must be reversed, with leave granted plaintiff to amend his pleading in accordance with the views here expressed. It is so ordered.

THE STATE OF NEVADA EX REL. S. T. SWIFT v. THE COUNTY COMMISSIONERS OF ORMSBY COUNTY.

"SUBSEQUENT TAX ASSESSMENT" OF VIRGINIA AND TRUCKEE RAILROAD COMPANY.

Where, under the provisions of the Supplemental Revenue Act of 1867, (Stats. 1867, 111) the Virginia and Truckee Railroad Company applied to the county commissioners of Ormsby County to have the "subsequent assessment roll" for 1869, as to its property, equalized; and the commissioners thereupon ordered the entire subsequent assessment roll to be stricken out and remitted: *Held*, that they acted beyond their powers, and that their order was void.

POWERS OF COUNTY COMMISSIONERS LIMITED AND SPECIAL. If the authority of the board of county commissioners, acting under limited and special powers, to do a particular thing is questioned, their record must exhibit affirmatively all the facts necessary to give them authority to do such thing, otherwise the presumption is against their jurisdiction.

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EXTENT OF RELIEF AS AGAINST SUBSEQUENT ASSESSMENTS. Under the Supplemental Revenue Act of 1867, (Stats. 1867, 111) allowing every person feeling aggrieved by a supplemental assessment roll to appear before the county commissioners and apply to have such assessment equalized, modified or discharged, and authorizing the commissioners to hold a meeting to hear and finally determine the matter: *Held*, that the commissioners had no power to interfere with the subsequent assessment roll, except upon application of some person feeling aggrieved, and even then, in granting relief, not to go beyond the application made.

TREASURER'S POWERS AS TO SUBSEQUENT TAX ASSESSMENTS. The evident object of the Supplemental Revenue Act of 1867 (Stats. 1867, 111) was to make all assessments made by the treasurer final, or at least, exempt them from any supervision by the county commissioners, except in cases where application might be made by a person feeling aggrieved.

QUESTION INVOLVED ON CERTIORARI. Where, on application of a person to equalize as to his own property the subsequent assessment roll, as provided in the Supplemental Revenue Act of 1867, (Stats. 1867, 111) the county commissioners ordered the entire subsequent assessment roll to be stricken out; and their proceedings were carried by *certiorari* to the Supreme Court: *Held*, that the question before the Supreme Court was solely as to whether the commissioners had the authority to make the order striking out the entire roll, and that it could not consider the question as to the authority to equalize or discharge the assessment of the particular person making the application.

This was a *certiorari* issuing out of the Supreme Court to the board of county commissioners of Ormsby County, consisting of H. F. Rice, S. E. Jones and A. B. Driesbach. The return contained the minutes of the board, showing the facts as stated in the opinion.

Robert M. Clarke, for Relator.

I. The powers of the county commissioners are limited, and the jurisdiction must specially and affirmatively appear. (*Finch v. Tehama Co.*, 29 Cal. 455; *Rosenthal v. Madison & Ind. Turnpike Co.*, 10 Ind. 358.)

II. County commissioners have no jurisdiction to "equalize, modify, or discharge an assessment," unless application is made therefor. (Statutes 1867, 111; *People v. Reynolds*, 28 Cal. 107; 6 Cushing, 477; 4 Nev. 254.)

III. Upon the application of the railroad company to have its assessment equalized, the county commissioners had no jurisdiction

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or authority to discharge the assessment roll as to other persons assessed but not applying.

[No brief for Respondent on file.]

By the Court, LEWIS, C. J. :

The record in this proceeding shows that on the eleventh day of January, A.D. 1870, the Virginia and Truckee Railroad Company, by its attorney, appeared before the County Commissioners of Ormsby County, and applied to have the supplemental assessment of its property for the year A.D. 1869 equalized; which application it appears the board refused to consider. On the twenty-fifth day of the same month, the motion to equalize was renewed, taken under advisement, and two weeks afterwards this order was made and entered upon the records. "On motion of Mr. Jones, and by unanimous vote of the board, it is hereby ordered that the entire supplemental assessment for the year 1869 be, and the same is hereby, stricken out and remitted." Of the order thus made Swift complains, and upon *certiorari* brings up the record of the proceedings of the commissioners, in which nothing material appears beyond what is here stated.

That the board of county commissioners, when acting upon the assessment roll, is a body possessing but limited and special powers is an admitted proposition. When therefore its power or authority to do particular things is questioned, the record must exhibit affirmatively all the facts necessary to give it the authority to do the act complained of. When this is not done, the presumption is against its jurisdiction. (29 Cal. 453; 22 Maine, 566; 3 Allen, 550; *State of Nevada v. The Board of County Commissioners of Washoe County*, 5 Nev. 319.)

What then is the extent or character of the power conferred upon the commissioners by the Act under which this proceeding was had? The answer is found in section one of an Act entitled "An Act supplementary to an Act entitled an Act to provide Revenue for the support of the Government of the State of Nevada," (Statutes of 1867, 111) which, after providing for the supplemental assessment, declares in the proviso that "any person feeling

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aggrieved by any such assessment may appear before the board of county commissioners and apply to have such assessment equalized, modified or discharged; and the board of commissioners shall hold a general or special session to hear and finally determine the matter." It will be observed that the commissioners have the power to "equalize, modify or discharge an assessment on the subsequent assessment roll, only upon the application of some person feeling aggrieved thereby." They cannot come together on their own motion, nor in any way interfere with the roll as made up by the county treasurers, except when a complaint is properly made.

This is manifest, not only from the proviso thus quoted, but also from the provisions of the second section of the Act. Thus the tax is made payable immediately, and it is made the duty of the *ex officio* tax receiver to collect it immediately after the assessment, unless an equalization is claimed, and if equalized, immediately thereafter. This officer is also clothed with all the power of "county assessors to enforce the payment of all personal property taxes so assessed, and may seize and hold a sufficient amount of property at the expense of the owner thereof to secure the payment of the taxes so assessed during the pendency of an application before the board of county commissioners to have such assessment equalized, modified or discharged."

It is clear beyond all doubt from the provisions of this law that the board has no control over, or power to interfere with the subsequent assessment roll, except upon the application of some person feeling aggrieved by the action of the treasurer. Admitting its right to convene for the purpose of considering an application made to equalize, modify or discharge, has it the right or authority to go beyond the application made to it in granting relief, or rather can it extend its inquiries beyond the assessment complained of? Certainly not. The authority given by the statute is simply "to hear and finally determine the matter." What matter? Manifestly, the matter presented by the person making application to it, and nothing else. The evident object of the law is to make all assessments made by the treasurer final, or at least to exempt them from any supervision by the county commissioners except in cases where application may be made by a person feeling aggrieved. Such being

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the object, it can hardly be said that if B complains of his assessment and asks that it may be equalized, the commissioners may not only act upon his complaint, but also equalize or discharge an assessment against C, who makes no complaint nor seeks relief. If such power be possessed by the board, why has the law required an application to be made at all by any person? We believe its action is confined strictly to the assessment complained of. Here, however, it does not appear that any one complained of the assessments or asked for relief, except the Virginia and Truckee Railroad Company; and this application was, to have the assessment on its own property equalized. Surely, upon such an application the commissioners could not equalize, modify, discharge, or in any way interfere with any other assessment. Their power was confined to the assessment complained of. But the order made by them and complained of here discharges the assessments of all persons, even where no complaint was made. It is therefore void, being entirely beyond the authority conferred by the law.

Again, it must be borne in mind that the order strikes out the entire subsequent assessment roll, and there is nothing in the law authorizing such action. Whence then the power? The board has no authority in this respect, except that which is expressly given, or is necessary to the execution of such as may be expressly conferred upon it. It might have the power to discharge every assessment if every person assessed made a proper application and showing, but its action in that case would not, if regularly pursued, be a general order striking out the roll, but should be a consideration of each assessment upon the evidence bearing upon each. It is not contended or claimed that such course was pursued here. It is argued, however, that so far as the Virginia and Truckee Railroad assessment is concerned, the application on its behalf gave the board jurisdiction of its assessment, consequently there was no want of power to discharge it; and hence, so far as the railroad is concerned, the order should be affirmed. The objection to such a course is, that it would virtually be a decision of a matter not before the Court. The only question presented by the record is, whether the board of commissioners had the authority to make the order striking out the assessment roll. We hold it had not; to

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pass upon the question whether it was authorized to equalize or discharge the assessment of some one person on the roll, would be the determination of a matter not directly raised by the record; and again, to do so would in effect be the making of an order for the commissioners which they may never have intended to make. They may, for aught that appears here, have had reason for striking out the entire roll; for example, some informality reaching the validity of the whole assessment, which would be applicable to all alike, without having any desire to discharge any single assessment for reasons applicable to it alone.

In this case, it in no wise appears that the order made was founded upon any showing made by the Virginia and Truckee Railroad, or upon its application. Indeed, the natural presumption is, that it was not; for the application by it was simply to have its own assessment equalized, while the order made was to strike out the entire roll. How, then, is this Court to know that there was any thing in the case of the railroad to warrant a discharge from its assessment more than in the other cases? There is nothing in the record to show that there was. And thus the Court might, by modifying the order instead of setting it aside entirely, do that which the commissioners may not have desired to do. We hold they had no authority under the circumstances to make the order made by them; and there we must stop, without determining whether they had the authority to do that which they have not directly attempted to do.

The order must be set aside. It is so ordered.

THE STATE OF NEVADA EX REL. JOHN C. FALL *et al.*,
APPELLANT, v. THE COUNTY COMMISSIONERS OF
HUMBOLDT COUNTY, RESPONDENTS.

HUMBOLDT COUNTY SEAT OF JUSTICE — EVIDENCE. A petition having been presented to the county commissioners of Humboldt County to remove the seat of justice as provided by law, (Stats. 1867, 78) and the commissioners having determined, from examinations and affidavits, that petitioners were legal voters, and having thereupon ordered an election: *Held*, on *certiorari*, that the evidence by affidavit was all that was necessary to give the commissioners jurisdiction to make the order; and that, as the question on *certiorari* was confined to jurisdiction, no further inquiry could be made.

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JURISDICTION THE QUESTION ON CERTIORARI. The only question which can be inquired into on *certiorari* is whether the inferior board or tribunal had jurisdiction to do the act sought to be reviewed.

RANGE OF INQUIRY ON CERTIORARI. Where county commissioners were required on receiving a petition of certain voters to do a certain act, and upon receiving a petition and satisfying themselves by evidence that it was from such voters, they did the act: *Held*, on *certiorari*, that they had acquired jurisdiction, and that whether their action was founded upon strictly legal or sufficient evidence, was not within the province of the inquiry.

APPEAL from the District Court of the Fifth Judicial District, Humboldt County.

This was a *certiorari* issued out of the Court below, on the petition of John C. Fall, Thomas J. Hadley, and Joseph Branham. The board of county commissioners of Humboldt County at the time consisted of Robert McBeth, Thomas Thompson, and Henry G. Cavin. After consideration, the Court found in favor of the commissioners, and the petitioners then appealed.

Clarke & Wells, for Appellants.

The commissioners had no power or authority to take any action in the premises, if the petitioners were not *legal voters*. The only evidence adduced that they were *legal voters* of Humboldt County, was such as was obtained *ex parte* and non-judicially. Under such circumstances, if any or all of the petitioners swore falsely, no action for perjury would lie.

The theory of the statute is this, that the petitioners therein contemplated must be legal voters of the county. That fact must exist; it is the *sine qua non* of jurisdiction. If the Board does not know, by legal proof, that the number of *legal voters* have signed the petition, it cannot act legally.

The only two modes by which the petitioners could legally have been shown to be qualified electors, or legal voters of Humboldt County, were: first, to have shown that they had been legally registered during 1869; or secondly, to have been examined before the commissioners as jurors are examined in and by Courts, and then have shown it.

The board erred, and the writ was properly issued and should have been sustained. (8 Cal. 58; 18 Cal. 49; 1 Cal. 152, 187.)

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O. R. Leonard, for Respondents.

[No brief on file.]

By the Court, LEWIS, C. J. :

"Section 1. When any number of legal voters of any county in this State equal to three-fifths of the whole number of votes cast at the last general election in said county, shall petition the board of county commissioners of such county for the removal or location of the seat of justice, the county commissioners shall within fifty days thereafter cause an election to be held at the various places of voting in said county ; said commissioners giving thirty days notice in some newspaper published in the county, or by posting written or printed notices at the several voting precincts in the county. Such notice shall state the time and place of holding, and the purposes for which such election is held. And any election provided for in this Act, may be held on the day of any general election for either State or county officers in such county. The place receiving a majority of all the votes cast at such election shall be declared the county seat. Provided no place receives a majority of all the votes cast, there shall be held a second election for said seat of justice on the second Tuesday thereafter, at which second election the balloting shall be confined to the two places having the highest number of votes at the first election, as provided for in this Act ; *provided*, that where the county seat of any county has been located by commissioners, such location shall not be held to be a location by the people." (Stats. 1867, 78.)

In accordance with the requirements of this section, a petition was presented to the county commissioners of Humboldt, and an order was made by them calling an election to be held on the sixth day of December, A.D. 1869. Upon application of appellant, a *certiorari* was issued from the District Court of that county to the commissioners, for the purpose of reviewing the action of the board. Upon the hearing, the Court found that the commissioners had regularly pursued their authority, and rendered judgment accordingly. From that judgment this appeal is taken, appellants relying for reversal upon the sole ground that the evidence taken by the board

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to ascertain whether the petitioners were legal voters or not was not competent, or sufficient.

From the record brought up, it appears the commissioners found the petitioners were legal voters; this conclusion was arrived at by an examination of the petitions, and the affidavit of each petitioner averring the facts showing him to be a legal voter. We can see no possible reason why the board should have required any evidence of that fact beyond the affidavit of the petitioners; but even if it be insufficient, still they found them to be legal voters—the record shows this—and the only question which can be inquired into here is, whether the board had jurisdiction to call an election. Whether its action was founded upon strictly legal or sufficient evidence, is not within the province of this Court to inquire upon *certiorari*. If the petitioners are legal voters, there is no question but the order was authorized, and it is founded upon proof that they were that is sufficient. Whether the order was supported by the best evidence, or whether it was sufficient, it is not necessary to determine. Judgment affirmed.

By JOHNSON, J. :

I am disposed to follow the rule laid down in the case of *Whitney v. Board of Delegates of the S. F. Fire Department*, 14 Cal. 479; which affirmed the principle stated by the Court of Appeals of New York, in the case of *The People ex rel. Bodine v. Goodwin*, 1 Selden, 568; and to the same effect is the case in *Mullins v. The People*, 24 N. Y. 403; that where the jurisdiction depends upon facts necessary to be established by evidence, such evidence is proper to be considered by the Court reviewing such proceedings on *certiorari*.

And moreover, in such a case I hold that it is competent for this Court to review the facts found by the Court below, upon the evidence properly brought up, as in other civil cases, such evidence tested by the rules which ordinarily govern in the trial of civil causes.

The evidence in this case as appears from the record fully supports the findings of fact; and the conclusions of law being warranted by such findings, I concur in affirming the order of my associates.

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THE STATE OF NEVADA EX REL. LEWIS HESS *et al.*,
APPELLANT, v. THE COUNTY COMMISSIONERS OF
WASHOE COUNTY, RESPONDENTS.

TIME OF ELECTION TO REMOVE COUNTY SEAT. Under the Act of 1867, for the removal of county seats, which provided that when a number of voters of a county equal to three-fifths of the number of voters at the last general election should petition for a removal, "the county commissioners shall within fifty days thereafter cause an election to be held," (Statutes of 1867, 78): *Held*, that the election must be held within *fifty* days after the establishment of the fact of a petition by the proper number of voters; and that where commissioners fixed the period at *seventy* days, their action was void.

STATUTORY CONSTRUCTION—PLAIN LANGUAGE. Where the language of a statute is plain, its intention must be deduced from such language, and Courts have no right to go beyond it.

POWERS OF COUNTY COMMISSIONERS SPECIAL AND LIMITED. Boards of county commissioners are of special and limited powers, and must always exercise their powers as prescribed, where such prescription is material.

CONFLICT OF STATUTES. The statute relating to the removal of county seats required an election to be held within *fifty* days after the order therefor (Statutes of 1867, 78). On the other hand, the registry law of 1869 (Statutes of 1869, 140) allowed registration for forty days prior to closing the register, which should close ten days prior to the day of election: *Held*, that though the latter law might render it impossible to hold an election within fifty days, still the former law was too clear and plain in its terms to mean that the fifty day period could be extended.

APPEAL from the District Court of the Third Judicial District, Washoe County.

This was a *certiorari* issued out of the Third District Court on the petition of Lewis Hess and H. H. Beck, against the board of county commissioners of Washoe County, consisting of M. J. Smith, W. R. Chamberlain, and G. W. Brown. A petition had been presented praying a removal of the county seat of Washoe County, from Washoe City to Reno, and an election was ordered as stated in the opinion. The Court below, after hearing the cause, dismissed the writ; and relators appealed.

Clarke & Wells, for Appellant.

I. In cases of *certiorari*, the Court is confined to the rendition of a judgment which will result in one of three things, namely: the af-

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firmance, or the annulment, or the modification of the proceeding, order or judgment to be reviewed. (Practice Act, Sec. 443.) The order of dismissal in this case does neither.

II. The petition upon which the board ordered the election was presented and filed February 1st, 1870, and the order for the election was made on April 5th, 1870. The election was ordered for June 14th, 1870, a period more than fifty days subsequent to the presentation of the petition, as well as the entry of the order. The order was, therefore, made by the board in excess of its legal jurisdiction, and is void.

III. The proceedings of a board of commissioners must show affirmatively, step by step, that it had jurisdiction to do what it did, derived from the statutes. (15 Cal. 296; 18 Cal. 130; 23 Cal. 403; 16 Cal. 392; 32 Cal. 53.)

Thomas E. Hayden, for Respondents.

I. If the commissioners derived from the petition any power to act, they had jurisdiction to try, hear, and determine upon it. If the election should have been ordered within fifty days, yet if the board had jurisdiction to try, hear, and determine upon the petition, their order as to the time of holding the election would only be an irregularity, not reviewable by this proceeding, which stops whenever it is ascertained that the board had jurisdiction to try, hear, and determine upon the petition itself.

It will be observed that the provision relative to the fifty days is disconnected by a comma after the word "shall" and before the word "cause," and the word "thereafter" relates to the time of "petition" and not to the time of ordering the election. That without regard to any fifty days, the election may be held on the day of the general election is plain from section four, which provides that the elections shall be conducted in all respects as provided by the general election laws of the State.

II. The registry law of 1868 requires forty days registration before any special election, and ten days to receive objections to voters before any such election. Give the Act our construction, and the commissioners would call the election within a reasonable time to

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qualify registry agents after appointment, to furnish registry books, to put in motion all the agents and machinery of an election; and they would be limited to do this within a reasonable time by the same discretion with which they transact all their business as officers of their county, sworn to do their duty.

III. If the proceedings on *certiorari* show no excess of jurisdiction, it follows there is no ground for the writ, and its dismissal is practically an affirmance of the judgment or order. If the District Court should have entered a judgment, affirming the order made, it is simply an error, which might have been amended on motion of either party.

IV. The proceedings and order of the board of commissioners could only be attacked for want of jurisdiction, and no irregularity, however glaring, would authorize the Court to interfere with their discretion and the proven will of the people.

By the Court, WHITMAN, J. :

This is an appeal from the judgment of the Third District Court dismissing a writ of *certiorari*, in the matter of the ordering a special election by the board of commissioners of Washoe County to decide the question of removal of the county seat of said county. Although the judgment of dismissal was perhaps not strictly regular, still it practically amounted to a judgment of affirmance of the action of the county commissioners, and so will be considered.

The numerous objections made to such action will not be reviewed in detail, as the one upon which this decision will be rested is in itself vital. The commissioners acted under the statute of this State entitled "An Act providing for the removal of county seats and the permanent location of the same," as follows :

SECTION 1. "When any number of legal voters of any county in this State equal to three-fifths of the whole number of votes cast at the last general election in said county shall petition the board of county commissioners of such county for the removal or location of the seat of justice, the county commissioners shall within fifty days thereafter cause an election to be held at the various places of voting in said county, said commissioners giving thirty days notice

in some newspaper published in the county, or by posting written or printed notices at the several voting precincts in the county. Such notice shall state the time and place of holding and the purposes for which such election is held. And any election provided for in this Act may be held on the day of any general election for either State or county officers in such county. The place receiving a majority of all the votes cast at such election shall be declared the county seat. * * * * *

SEC. 4. "The election provided for in this Act shall be conducted in all respects as provided for by the general election laws of this State." (Stats. 1867, 78.)

The order for the election was made upon the fifth day of April, 1870, calling the election upon the fourteenth day of June following, a space of seventy days. The commissioners had the power upon the establishment of the fact that three-fifths of the legal voters of the county so petitioned, to order an election to decide the matter of the removal of the county seat from one point and its location at another; but such election they must cause to be held within fifty days from the establishment of such fact, and in time to afford thirty days notice of the election. The right to order being thus circumscribed, the board could only so proceed, unless as is suggested, the time prescribed was simply in the nature of a direction and not a mandate.

As has been frequently decided by this Court, when the language of a statute is plain, its intention must be deduced from such language, and the Court has no right to go beyond it. (*Virginia and Truckee Railroad Co. v. County Commissioners of Lyon County*, ante, p. 68.) So here, the commissioners "within fifty days thereafter shall cause an election to be held." It would be straining the meaning of words to say that the natural, ordinary interpretation of such language was that sometime within fifty days the commissioners should order an election to be held at any future time their discretion or caprice might dictate; and yet this is the conclusion urged by counsel for defendants, in substance: he claims that jurisdiction once acquired by the presentation of the petition, the subsequent order in the case at bar was what the statute contemplated, or at most an irregularity.

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The first, it has been attempted to be shown, it is not under the proper rule of construction ; and the latter it cannot be ; it is either right, or else an excess of jurisdiction ; for a board of commissioners, being of special and limited powers, must always exercise their powers as prescribed, where such prescription is material. When the Legislature has said to this board of special limited powers, you shall cause an election to be held within a certain time, who shall say that the matter of time is immaterial ? The intention may have been to protect the petitioners ; for if the construction urged be adopted, the board could place the election at such a distance of time as to render the order a practical nullity ; and there would then be no redress, as that would be simply an error under the regular pursuit of authority, not subject to review by this or any other Court ; or the intention may have been something other, or for multiple purposes ; but there stands the plain language, and it should not be frittered away.

It is said that under such construction the Act referred to is a nullity, as the election law prescribes registry as a prerequisite to voting, and the registry law in all cases of special election allows forty days for registering, and ten days thereafter for objections to be heard and determined, and registry copies for officers of election to be made ; so that fifty full days must elapse from the opening of the registry to the day of election, thus rendering it an impossibility to cause an election to be held within fifty days, as prescribed by the statute quoted. This would seem, unfortunately, to be the fact, and such result would be avoided by this Court if possible ; but the law is too clear and plain for such avoidance, and the consequence is simply another illustration of the evil of too much legislation.

When the Act quoted was passed, the Registry Act only required the books to be kept open ten days prior to any special election, such as the one in question. (Statutes of 1866, 83.) So there was coherence between the two statutes ; but in 1869, the Act last cited was repealed, and the provision made that registration might be made "for forty days prior to closing the register (which shall close ten days prior to the day of election) for any special or municipal election," thus producing the existing conflict. The

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action of the commissioners in endeavoring to reconcile the two statutes, as it is evident was the desire, though it may have been through deference to the wishes of the people as expressed by petition, still was in excess of the jurisdiction of the board, and therefore void. The District Court erred in affirming such action, and its judgment is reversed, with directions to enter a judgment annulling the proceedings of the board of county commissioners of Washoe County, had upon the fifth day of April, A.D. 1870, touching the matter of the removal of the county seat.

LEWIS, C. J., did not participate in the foregoing decision.

STATE OF NEVADA, RESPONDENT, v. JOHN MCGINNIS,
APPELLANT.

CRIMINAL LAW—APPEAL—INSUFFICIENCY OF EVIDENCE. A judgment in a criminal case will not be disturbed by the Supreme Court on the ground of insufficiency of the evidence, if there be any evidence tending to prove the allegations of the indictment.

JURIES NOT MISLED BY UNOBJECTIONABLE INSTRUCTIONS. It cannot be claimed that a jury in a criminal case has been misled by a charge of the Court, in which no specific error is suggested or appears.

EVIDENCE OF GOOD CHARACTER IN CRIMINAL CASES. An instruction in a criminal case to the effect that evidence of good character is proper in all criminal cases, and that in doubtful cases it frequently becomes material, and is sufficient to turn the scale in favor of the accused; and that, should the jury be in doubt as to the facts or guilt of defendant, it might give evidence of previous good character such weight as to acquit: *Held*, to be entirely too broad, and properly refused.

"INDEPENDENT AND POSITIVE EVIDENCE" AS TO CRIMINAL INTENT. An instruction in a criminal case to the effect that the intention of the accused at the time of the act done is the principal fact upon which defendant's guilt as charged depends; and that it is the duty of the State to establish by positive evidence the intention of the accused, so as to leave nothing to be inferred from the other facts of the case with regard to the intention; and that if the State failed to give such independent and positive evidence of intention the jury should acquit: *Held*, erroneous and properly refused.

PROOF OF CRIMINAL INTENT. Criminal intent can only be proven as a deduction from declarations or acts; when the acts are established, the natural and logical deduction is that defendant intended to do what he did do, and if he offers no excuse or palliation of the act done, such deduction becomes conclusive.

APPEAL from the District Court of the Third Judicial District, Washoe County.

The assault, out of which the prosecution arose, took place about eleven o'clock of a star-light night, in June, 1869, near Erlanger's corner, in Washoe City. Several witnesses were attracted to the spot, only one of whom testified to seeing a pistol in defendant's hands. The only testimony introduced in defense was that of two witnesses, as to defendant's previous good character for peace.

A motion for new trial having been denied, defendant was sentenced to pay a fine of one thousand dollars, or be imprisoned in the county jail of Washoe County at the rate of one day for every two dollars of unpaid fine.

Webster & Boardman, for Appellant.

I. That the accused had no considerable provocation for the assault is an essential fact, and should be affirmatively proven. (*Commonwealth v. James McKie*, 1 Criminal Leading Cases, 347; *Commonwealth v. Clarke*, 2 Met. 24; Bishop's Criminal Procedure, Sec. 496; *People v. Marks*, 4 Parker's C. C. 153.)

II. When the Court, in charging the jury, makes use of language in a sense different from that in which it is generally used, the sense in which it is used should be explained to the jury, or they will be left in doubt or uncertainty as to the meaning of the terms. When the words *legal intent* are used, the Court should explain their import. (*People v. Byrnes*, 30 Cal. 207.)

III. If certain acts are shown to have been committed by an accused person, the law does not conclusively presume in all cases that he intended all immediate and necessary results arising therefrom. The Court should qualify such instructions so as to meet the case on trial, or the jury will be misled. (1 Criminal Leading Cases, 353; *Swallow v. The State*, 22 Alabama, 20; 1 Bishop's Criminal Procedure, Secs. 486, 492, *et seq.*; 2 Criminal Leading Cases, 514; Bursell on Circumstantial Evidence, 49; *State v. Gardner*, 5 Nev. 377.)

Robert M. Clarke, Attorney-General, and *Thomas Wells*, for Respondent.

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I. The record shows that the defendant offered no testimony except as to his previous good character for peace. The evidence for the State on the other hand was clearly sufficient to justify the verdict, because while the *corpus delicti* was proved by direct, positive testimony, there was no effort made to show any, even the slightest, provocation given to induce or justify the assault.

II. The intent, certainly, is the gist of the offence, but it does not necessarily have to be proven by direct, positive evidence; it may be deduced from the circumstances of the offense; as that the assault was made not *se defendendo* and unprovoked. (Statutes of 1861-64, Sec. 47; 29 Cal. 687; 3 Greenleaf Ev., Sec. 13; 1 Bishop's Criminal Law, Sec. 227; 28 Cal. 490; 30 Cal. 151; 32 Cal. 231; 34 Cal. 191; 5 Blackford, 579.)

III. The evidence given of defendant's previous good character for peace and quietude was not within the rule. (5 Cal. 12; 6 Cal. 214.)

By the Court, WHITMAN, J. :

Defendant was convicted of an assault with a deadly weapon with intent to inflict upon the person of one William D. Knox a bodily injury, committed by striking said Knox on the head with a heavy pistol.

It is sought to reverse the judgment upon several grounds. First, of insufficiency of the evidence. There was some evidence tending to prove the allegations of the indictment. Such being the case, the verdict cannot be disturbed by this Court.

The second ground urged is, that the charge of the Court is not law, is ambiguous, and misled the jury. No specific error is suggested, and upon review of the entire charge none appears, so it cannot be said that the jury could have been misled.

The third ground of error is, the refusal to give certain instructions asked by defendant, as follows: "Evidence of good character is proper in all criminal cases, and in doubtful cases frequently becomes material, and is sufficient to turn the scale in favor of the accused; and should the jury in this case be in doubt as to the facts or guilt of the defendant as charged, you may give evidence of previous good character such weight as will turn the scale in his favor, and find the defendant not guilty."

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2d. "The intention of the accused at the time of beating Knox as charged in the indictment is the principal fact in the case, and upon which the defendant's guilt as charged depends. It is the duty of the State to establish by such positive evidence the intention of the accused at the time of the beating charged, as to leave nothing to be inferred from the other facts in the case, with regard to the defendant's intention to do Knox a bodily injury at the time of the assault charged; and if in your judgment the State has failed to give such independent and positive evidence of intention, you will acquit the defendant as charged in the indictment."

3d. "If the State has not established by proof, independent of the other facts in the case, that McGinnis at the time of the assault charged intended bodily injury to Knox, you are bound by your oaths to acquit him of such intention."

The first of these instructions is stated in language altogether too broad. (*Stephens v. People*, 4 Parker's C. C. 396; *Coats v. People*, Ibid, 662.) The second instruction states, or attempts to state, a proposition which it is somewhat difficult to understand. How can an intention be proven save as a deduction from declarations or acts? Of the two, the latter is the safer foundation for the deduction. The deduction should be natural, and so logical; but there can be no express positive proof of an intention other than as suggested. In this case the jury, by their verdict, found that the defendant was guilty as charged. To warrant that finding under the proof, they must first have found the fact of the striking of Knox upon the head by defendant with a heavy pistol. Second, that Knox was thereby injured. As has been said, there was evidence tending to establish these facts; such being found, the only natural or legal deduction as to the intention of defendant therefrom was, that he intended to do what he did do; and such became conclusive when he offered no excuse or palliation of the act done. The jury were authorized to make this deduction from the facts, and so the intention was proved, and it would have been gross error for the Court to have given the instructions asked. The third instruction falls within the same rule.

The judgment of the District Court is affirmed.

LEWIS, C. J., did not participate in the foregoing decision.

State of Nevada v. Napper.

STATE OF NEVADA, RESPONDENT, v. THOMAS NAPPER,
APPELLANT.

CRIMINAL LAW—ASSAULT WITH DEADLY WEAPON. To constitute the crime of assault with a deadly weapon with intent to inflict a bodily injury, there must be an unlawful attempt with a weapon, deadly either in its nature or capable of being used in a deadly manner, to inflict a bodily injury, and with the present ability so to do.

ATTEMPTED ASSAULT WITH UNLOADED PISTOL. Where on a trial for assault with a deadly weapon with intent to inflict a bodily injury, it appeared that defendant, within shooting but not within striking distance, held a capped pistol in his hand, pointed it at the prosecutor, and attempted to discharge it: *Held*, that there could be no conviction without proof that the pistol was loaded.

A PISTOL NOT ALWAYS A DEADLY WEAPON. A pistol may be a deadly weapon under some circumstances without being loaded, but not so unless it can be used in some other deadly manner besides shooting.

NO PRESUMPTION OF LOADING OF PISTOL FROM ATTEMPTED USE. The fact that an attempt was made to use a pistol as if it were loaded is not of itself sufficient to warrant an inference that it was loaded.

ASSAULT—ABILITY AND INTENTION. To warrant a conviction for assault with a deadly weapon with intent to inflict a bodily injury, there must be a showing of both ability and intention to commit the offence.

APPEAL from the District Court of the Sixth Judicial District,
Lander County.

The difficulty out of which this prosecution arose occurred in the main street of the town of Eureka, in Lander County, on February 15th, 1870. On the morning of that day, defendant and George Lambert seem to have had some words. In the afternoon, Lambert was driving a mule team, when Napper and one "Buffalo Bill" approached, and the alleged assault took place. The defendant, having been convicted and a motion for a new trial denied, was sentenced to imprisonment at hard labor in the State Prison for the term of two years.

Garber & Thornton, for Appellant.

I. The instruction asked directing an acquittal should have been granted, for the reason that there was an entire failure to prove that the pistol was loaded—or was a "deadly weapon"—or that defendant had a "present ability" to commit a violent, or any injury.

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The most the prosecution can claim to have proved is, that defendant, while standing at some distance from the prosecutor, and not intending or attempting to advance on him, or to strike him, cocked the pistol; that it was *capped*, and the defendant presented it at or towards the prosecutor, and acted as if he were trying to discharge it; but failed, either because it was not loaded, or because it was in such condition, or so defective, that it would not revolve or discharge. The burden of proof was on the State to make out beyond a reasonable doubt every element of the offense charged. (*State v. McCluer*, 5 Nev.; *People v. Vanard*, 6 Cal. 562; *People v. Jacobs*, 29 Cal. 579; *People v. Yslas*, 27 Cal. 633; *Greenleaf Ev.* § 82 and note 3; *People v. Davis*, 4 Parker Cr. R., 61; *O'Neary v. People*, *Ibid*, 187; *State v. Swails*, 8 Ind. 524; *Henry v. State*, 18 Ohio, 32; *R. v. Harris*, 5 Car. & Payne, 159; *Shaw v. State*, 18 Alabama, 547; *State v. Blackwell*, 9 Alabama, 79; *Mulligan v. People*, 5 Parker Cr. R., 105; *People v. Board*, 16 Abb. Pr. 337.)

II. The burden of proof being on the State, there was no necessity for defendant to introduce any evidence that the pistol was harmless. (*Commonwealth v. Hardiman*, 9 Gray, 186.) Proof that a pistol is capped is in no sense even *prima facie* proof that it is loaded: the fact of capping raises no sort of presumption of loading, certainly not one strong enough to overcome, beyond reasonable doubt, the presumption of innocence.

Robert M. Clarke, Attorney General, for Respondent.

I. Criminal intent is a fact for the jury, to be established like any other fact by proof positive, circumstantial or presumptive. It need not be "expressly" proved. (1 Wharton C. L., Secs. 631, 712; 8 Cal. 547.)

II. It is not the injury committed or crime perpetrated, but intended and attempted that the law punishes. In this case it was not necessary for the prosecution to prove the pistol loaded. It is sufficient if the pistol be drawn within shooting distance, accompanied by threats to shoot. (1 Wharton C. L., Sec. 1244; 1 Bishop C. L., Sec. 988; 2 Bishop C. L., Sec. 58; 8 Cal. 547; *The State v. Cherry*, 11 Iredell, 475; 5 Texas, 18; 2 Humph. 457.

By the Court, WHITMAN, J. :

The indictment in this case was for "an assault with a deadly weapon, with an intent to commit murder." The defendant was convicted of "an assault with a deadly weapon with an intent to inflict a bodily injury" on the person of one George Lambert. The statute of this State defines an assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury upon the person of another."

To constitute, then, the crime of which defendant was convicted, he must have made an unlawful attempt with a weapon deadly either in its nature, or capable of being used in a deadly manner, intending to inflict a bodily injury and with the present ability so to do. All these constituents of his crime must be established. That the pleader was aware of this fact appears from the indictment.

If in this indictment it was necessary to allege that the pistol was loaded with gunpowder and leaden bullets, which under the circumstances it was, or to aver what was tantamount, that it was a deadly weapon, then it became necessary to support the allegation by proofs. There was no proof that the pistol was loaded with anything. Lambert was not within striking distance of defendant, but was within shooting range. The pistol held in the hand of defendant, capped, pointed at Lambert, and attempted to be discharged, would not be a deadly weapon unless loaded with something capable of wounding when discharged. No presumption of such loading can arise under the statute. To so presume is to infer a present ability, which is matter of affirmative proof, and from such inference to draw another of intention, and thus reason in a circle saying: To constitute the crime, must appear—first, a deadly weapon; second, the intention coupled with the ability to use it against the person of another. So the weapon is presumed to be deadly because defendant attempted to use it as if it was, and the intention and ability are both presumed from the attempt; thus raising an inference upon an inference. There must be some primary proven fact to support any legitimate inference. In this case, the primary fact to be proven was the existence of a deadly weapon. A pistol may be a deadly weapon under some circumstances, without

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being loaded with gunpowder and ball. Under the circumstances of the present case it could not, so it was incumbent upon the prosecution to prove the fact. (*State v. Swails*, 8 Ind. 524, and note; Wharton Am.Crim. Law, Sec. 1280; *State v. Neal*, 37 Maine, 468.) The defendant asked the Court to instruct the jury "That unless the State has proven beyond a reasonable doubt that the pistol of Napper was loaded, and in such a condition that it was capable of being discharged, they must find defendant not guilty." Certainly there could not have been both the ability and *intention* to assault unless the facts suggested in the instruction existed, and had been proven; therefore the instruction should have been given, and the refusal was error, for which the judgment is reversed and the cause remanded.

LEWIS, C. J., did not participate in the foregoing decision.

THE SILVER MINING COMPANY, APPELLANT, v. JOHN
C. FALL *et. al.*, RESPONDENTS.

ARIZONA SILVER LEDGE—PROOF REQUIRED TO SUPPORT A PLAINTIFF'S THEORY.

Where it appeared that plaintiff owned the Arizona Silver Ledge south of a certain line, and defendant owned north of the line, and suit was brought to recover a deposit and prevent defendant working at a point south of the line, on the theory that it was on the ledge, which defendant denied; and the Court instructed the jury, that to entitle the plaintiff to recover he must establish his theory conclusively, and not merely by a preponderance of evidence: *Held*, error.

INSTRUCTIONS—EVIDENT MEANING VERSUS LITERAL LANGUAGE. Where in an instruction a Court used the phrase, "the existence of such theory must be established by the plaintiff conclusively": *Held*, that although taken literally the language was nonsense, the Court evidently intended to say, and it should be assumed the jury so understood it, that the correctness of the theory must be so established.

PROOF OF "THEORY OF CASE." If the establishment of a plaintiff's case depends upon the establishment of a theory, the correctness of the theory need not be established by any stronger proof than would be required for the case itself, which in general is only preponderating proof.

CONCLUSIVE PROOF NOT REQUIRED. "Conclusive proof" is not required by the law; that degree of certainty is left to the domain of mathematics.

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AMOUNT OF SECONDARY EVIDENCE TO ESTABLISH A FACT. If evidence of a secondary character be admitted to establish a fact, there is no rule that requires more of such evidence than would be required of the best.

PRACTICE ACT, SEC. 160—DEVELOPMENT OF MINES—EVIDENCE. There is nothing in Sec. 160 of the Practice Act (which authorizes a delay of proceedings in mining cases for the purpose of allowing developments to be made) to show that it was intended to make actual developments the only or even the best evidence admissible.

APPEAL from the District Court of the Fifth Judicial District, Humboldt County.

This was an action against John C. Fall and D. H. Temple, for the recovery of a silver-bearing lode, claimed to be a portion of the Arizona Ledge near the town of Unionville, in Humboldt County, and for an injunction to restrain them from working it. The issues having been submitted to a jury, there was a verdict and judgment for defendants. Plaintiff appealed from the judgment.

Thomas H. Williams, for Appellant.

I. The idea that the Court directed a consideration of the fact only as to whether the plaintiff had proved conclusively that a certain theory was urged in its behalf, and not as to whether that theory was true, would simply be to suppose the Court indulged in meaningless twaddle about a matter which could not by any probability have any bearing on the case. The presumption is, that the Court intended the instruction to apply to some controverted question involved in the case; and although the most accurate language was not employed, yet the meaning should be given to the terms used which was evidently intended, and which the jury must have given them.

II. It is well settled that for a plaintiff to recover in civil cases, it is only necessary to sustain his allegations by a preponderance of testimony. (1 Greenleaf on Ev., Sec. 18; 6 Nev. 137.) In criminal cases, it is only necessary to a conviction that the prosecution satisfy the jury of the truth of their hypothesis, beyond a reasonable doubt; but in this case the plaintiff was required to go even beyond that, and put the question beyond dispute or argument.

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III. Though a controverted point in a mining case can be definitely settled by actual exploration and development, it does not follow that it is the duty of the party maintaining the affirmative of the proposition to make such exploration. All one has to do to recover in a civil action is to satisfy the jury by a preponderance of competent testimony that he is right. He must be the judge of the amount of testimony he shall introduce; and if he brings himself within the rule, it certainly does not lie within the mouth of his adversary to complain because he has not made his case stronger.

IV. The plaintiff was not entitled to recover without reasonably satisfying the jury that its witnesses were correct in their inferences; but the Court required more than that, by telling the jury that the plaintiff, to recover, must establish the theory so conclusively as to preclude all argument or controversy.

R. S. Mesick, for Respondent.

I. There was no error in the instruction (which was given by the Court on its own motion) when applied to the circumstances of the case. The burden is on the appellant of explaining how any instruction or ruling complained of produced injury. But appellant contends that the extent of the developments made were so great as to demonstrate the connection of the *locus in quo* of the alleged trespass with the main lead; hence there was no room for theory, and the instruction could not have misled, for it declared that a theory must be sustained by just such development as actually existed in this case. It might have been injurious to respondent, but could hardly be so to appellant, when the proofs or developments which the instruction demands to support a theory both parties admit had been made in the case, so far as any theory of the appellant was concerned.

II. The instruction was correct. Its point was, that when a party seeks to maintain an action for an alleged trespass upon his premises, he must prove the place of trespass to be within his premises, not by the mere opinion of persons called experts or others, but by proofs more reliable. The nature of the case was such that demonstration could be had; and all who have participated in

the trial of mining cases know that the invariable answer of experts and practical miners is, that the only way of determining whether two bodies of quartz are in the same vein or not is by development, and that by development the question can always be determined with certainty. The Legislature seems to have taken this view of the question in making the provision for delaying a trial until the proper development could be made in mining cases, as set forth in the Practice Act, Sec. 160.

III. The action was an attempt to recover not upon a "theory alone," but upon practical development; and so the instruction was a mere abstraction, and not capable of doing harm.

Garber & Thornton, also for Respondent.

I. If, as an abstract proposition, the instruction was erroneous, there is no cause for reversal, as it was wholly abstract and irrelevant. A new trial will not be granted for erroneous instructions, where they are harmless as to the real questions presented to the jury. (*McCready v. S. C. R. R. Co.*, 2 Strobbh. 356; *Prichard v. Myers*, 11 S. & M. 169; *Smith v. Kerr*, 1 Barb. 158; *Selleck v. Sugar Co.*, 13 Conn. 460; *Roots v. Tyner*, 10 Ind. 90.)

II. Where development may decide the controversy, one way or the other, it is idle to resort to theory at all. There is no hardship in requiring the plaintiff to make a connection by actual development: without it, that certainty cannot be attained which the law requires; without it, we simply leave to the caprice and prejudice of juries the property of every miner in the State. Unless plaintiff is compelled to prove his case by actual development—to follow his ledge into the other—there can be nothing certain or trustworthy in the theories and conjectures of geologists and experts as to the course, dip and width of veins formed millions of years ago, or as to the agencies by which they were formed. We were entitled to the best evidence, and mere theory is not the best evidence. *Williams v. The East India Company*, 3 East. 192.

By the Court, LEWIS, C. J.:

The parties to this action having had some controversy concerning their respective rights upon a certain quartz ledge, on the 20th

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day of April, A.D. 1869, for the purpose of compromising the difficulty, each executed to the other a deed of conveyance, whereby the plaintiff conveyed to the defendants all its right, title and interest in the Arizona ledge, lying south of a designated point, together with all the spurs and angles; and Fall and Temple, in return, executed a deed to the plaintiff, which declares: "That the said parties of the first part (Fall and Temple) in consideration of a full and amicable compromise and settlement between the parties hereto, upon the terms stated in a stipulation on file in the Fifth Judicial District Court, State of Nevada, of certain actions at law between said parties in said Court, and the further consideration of a good and sufficient deed of conveyance, conveying all the right, title and interest of said party of the second part to said parties of the first part of, in, and to all that portion of the Arizona ledge, lead or lode, situate in Buena Vista Mining District, Humboldt County, Nevada, lying south of a point on said ledge marked by an iron pin driven into the rocks, on the west side of the upper tunnel, fifteen feet north of the incline of said party of the second part bearing on said ledge, hereby grant, bargain and sell, remise, release and quitclaim unto the said party of the second part, all the right, title and interest of the said parties of the first part of, in, and to the following described mining ground, situate in the said Buena Vista Mining District, to wit: All that portion of the Arizona lead or lode lying south of an iron pin driven into the rocks on the west side of the upper tunnel, fifteen feet north of the incline of said party of the second part, in and upon said Arizona ledge for a distance of twelve hundred feet in a southerly direction from said iron pin, and all right, title and interest in and to said ledge south of said point, by virtue of, and by reason of, the location of the claim known as the Manitowock No. 2, together with all the dips, spurs and angles, rights, privileges and appurtenances thereof."

The defendants having passed south of a line protracted westerly from the pin mentioned in the deed, and at a point about seventy-five feet southwesterly from the pin, and having come upon argenteriferous rock, proceeded to take it out and appropriate it; when this action was commenced by the plaintiff, it claiming that they were upon that portion of the Arizona ledge deeded to it by the instru-

ment above referred to ; that is, south of a line protracted from the iron pin. That they are south of such line is conceded, but it is claimed by defendants that they are not on the Arizona ledge, or if so, that they are on a spur projected from the ledge north of the line and extending south of it, and consequently, that it belongs to that portion of the ledge lying north of the line, although extending south of it. The plaintiff claims that the ledge lies rather horizontally in the hill, and that the defendants are at work on the same ledge as that in which the iron pin is driven, or what is called in the deed, the Arizona ledge. It is also claimed by plaintiff that the defendants have no right to follow a spur or angle of the ledge south of the division line designated by the pin.

After a conclusion of the evidence upon these issues in the Court below, the Judge charged the jury in this manner: "When a mining claim is sought to be recovered in an action on a theory alone, and the correctness of such theory is denied by the defendant in the action, the existence of such theory must be established by the plaintiff conclusively, and not merely by a preponderance of evidence, in order to entitle him to recover ; that is, where there is no actual developed connection between the ledge owned and claimed by the plaintiff and the one he seeks to recover as a part of the same lode."

The giving of this instruction is assigned as error by the plaintiff. By the words "existence of such theory" must be understood correctness of such theory. To say that the Court meant that the *existence* of a theory must be conclusively proven would simply make nonsense of the instruction. The Court evidently intended to say, and it must be assumed the jury so understood it, that the correctness of the theory must be so established. A theory exists if it be simply announced by a single individual. So there can be no question of preponderance of evidence to establish its existence, but there may be as to its correctness.

That it misstates the law, and when taken in connection with the facts of this case was calculated to mislead the jury, can scarcely admit of doubt. Let the facts be examined. The main issue between the parties was the identity of the ledge owned by the plaintiff and into which the iron pin was driven, and the body of quartz upon

which the defendants were working. The plaintiff claimed that its ledge lay in the hill in a horizontal position, dipping in the center, forming a saucer-shaped deposit; that it extended to where the defendants were at work, and that the ore taken out by them was from this ledge. There was no developed connection, as the instruction would seem to require, between the plaintiff's portion of the ledge where the pin was driven, and the point at which the defendants were at work. A drift had been run a portion of the way, but it remained incomplete when the action was tried. Thus, at the time of trial there was no developed connection whatever south of the line dividing the claims of the respective parties between the point where the defendants were at work and the ledge admitted to be owned by the plaintiff. Under the circumstances, it became necessary for the plaintiff to rely upon a theory, which was, that the ledge was in the form and lay in the position already mentioned. This theory or conclusion was doubtless drawn from what could be observed from the configuration of the hill, and from such developments as had been made in the neighborhood. But the instruction made it necessary to establish its case either by such developed connection, or by a conclusive establishment of its theory respecting the position of the ledge. Not having made such development, and being compelled to rely upon what is here called theory, it becomes necessary to determine whether such theory must be conclusively established, or only like any other fact upheld by a preponderance of evidence. If a party be entitled to recover at all upon a theory, why should it be required to be established by evidence different from any other fact? What is here called a *theory*, if it be established, would have entitled the plaintiff to recover. To establish the correctness of the *theory* was to make out a case for the plaintiff. If correct, the plaintiff would undoubtedly be entitled to recover, and upon such correctness its case depended.

In many cases, as it may have been here, the proof adduced to establish the theory as directly and strongly tends to make out the main case as to establish the theory itself; that is, where the establishment of the theory is equally an establishment of the case. Why then should the correctness of the theory be established by any stronger proof than the case itself? Wherefore the rule, that a

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theory should in any case be conclusively established? If a drift were run to connect the ledge upon which the pin is driven, and the *locus in quo*, and there was upon examination a question as to whether there was a continuous quartz connection, or whether the drift for its entire length passed through vein matter, surely the plaintiff would not be required to establish these facts conclusively. If its evidence outweighed that of the defendants upon them, it would be entitled to recover; but not more so than if the preponderance of evidence established the theory upon which the plaintiff relied in this case. If, for example, the theory advanced by plaintiff that its ledge lay horizontally in a saucer shape in the hill could be established to the satisfaction of the jury, it would tend at least to make out its case. Why then should it be required to establish the correctness of such theory conclusively, any more than any collateral fact in a case from which the main issue is deduced? It is very seldom that direct and positive proof is presented upon the main issues between parties in any case. The main facts are generally deductions from collateral facts proven. So here the theory advanced by the plaintiff was not direct evidence that the defendants were at work on the ledge in which the pin was driven, but it was, if established, a collateral fact tending to establish it. If the plaintiff had the right to rely upon a theory at all, and produce evidence to establish it, certainly there is no rule of law known to the books which requires it to be conclusively established. The law requires nothing to be conclusively proven. It leaves that degree of certainty to the domain of mathematics. All that is generally required in civil actions is a preponderance of evidence upon any issuable fact.

But it is argued that the instruction was not relevant to the case, because the plaintiff did not rely upon theory alone, and hence if erroneous the case should not be reversed, because it cannot be presumed the jury were misled by a statement of an abstract proposition of law not applicable to the facts. Counsel are certainly mistaken as to the matter of fact. The instruction required from the plaintiff, either a developed connection between the plaintiff's ledge and the point of dispute, or a conclusive establishment of its theory. Now it cannot be claimed that there was any such

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developed connection. It was admitted at the argument that the drift which had been projected to make such development was not completed. The developments which were made in the chamber, and by the defendants, certainly did not amount to a developed connection between the ledge marked by the pin and the point where defendants were at work, nor did any of all of the developments existing at the time of trial make such connection between the two points. The plaintiff was then driven to the necessity of advancing its theory of the horizontal position of the ledge, and in that way establish the fact that it extended to the point in dispute. The defendants claimed that there were two ledges decussating each other at a point north of the division line; but the plaintiff sought to show that there was but one ledge south of the division line, and that the defendants were at work upon it. This was not established by development—that is, by a drift extending from the known ledge to the point in controversy—hence the necessity for the theory which was adopted to rebut the case made by defendants.

Again, it is argued that the theory attempted to be established by plaintiff was not the best evidence, and that the Legislature of this State, by authorizing a delay of proceedings in cases of this kind for the purpose of allowing developments to be made, intended to require actual development as the best evidence. If the evidence offered by the plaintiff were not the best evidence, the proper course was to object to its admission. If admitted at all, we know of no rule which requires more evidence of secondary character to establish a fact than of the best. In either case, a preponderance is all that is generally required.

Nor can we see anything in the statute referred to, from which to conclude that the Legislature intended to make actual development the best, or only, evidence in mining cases. The section referred to simply authorizes the delay of proceedings for the purpose of allowing either party to make developments should they choose to do so, without any intimation that that should be the only evidence admissible.

The fifth instruction seems also to be incorrect; but as our views of the one above referred to necessitate a reversal of the case, we deem it unnecessary to discuss it.

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The judgment of the Court below must be reversed. It is so ordered.

WHITMAN, J., being disqualified, did not participate in the above decision.

S. T. SWIFT v. LEWIS DORON.

FEES FOR PROSECUTING DELINQUENT STATE TREASURER. Where a sheriff had a bill for fees in a suit by the State against the estate of a delinquent State treasurer and the sureties on his official bond: *Held*, that he could not claim payment out of a State appropriation "for prosecuting delinquents for infraction of the revenue laws," and that the controller properly refused to issue his warrant therefor.

APPROPRIATION TO PROSECUTE INFRACTION OF REVENUE LAWS — CONTROLLER'S DUTIES. The money appropriated by the Legislature in 1869, "for prosecuting delinquents for infraction of revenue laws, to be expended under the direction of the controller," (Stats. 1869, 188) is in the nature of a contingent fund for the better and more complete carrying out of the duties of the controller's office touching the revenues of the State; it is under his control not simply for him to draw his legal warrants upon, but for him to direct its expenditure.

DELINQUENCY OF STATE TREASURER NOT INFRACTION OF REVENUE LAWS. The delinquency of the State treasurer in failing to safely keep the money of the State, cannot be said to be an infraction of the "revenue laws," specially so called.

This was an original petition for *mandamus* in the Supreme Court. The bill of the plaintiff amounted to one hundred and forty dollars and fifty cents, and accrued in an action instituted in the District Court in Ormsby County, against Henry A. Rhoades, the administrator, and the sureties on the official bond of Eben Rhoades, late State treasurer, to recover one hundred thousand dollars, moneys of the State received by him, and alleged to have been converted to his own use.

Thomas Wells, for Petitioner.

R. S. Mesick, for Respondent.

By the Court, WHITMAN, J. :

The plaintiff, sheriff of Ormsby County, has a claim against the State of Nevada, regularly allowed and audited, for fees in a suit by

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the State against the administrator of the estate of the late State treasurer and the sureties upon his official bond. For this claim, the defendant, State controller, refuses to issue his warrant, alleging that there is no appropriation therefor. Unless there is, it is confessed that he is correct in his action ; but plaintiff insists that there is a specific appropriation, and seeks a *mandamus* compelling defendant to draw his warrant thereon. He finds the appropriation included in the general appropriation bill of 1869 (Statutes of 1869, 188) in the following language :

“ For prosecuting delinquents for infraction of revenue laws, to be expended under the direction of the controller, two thousand dollars.”

It is admitted that this particular appropriation is unexpended, and expressly stipulated that, unless the demand of plaintiff is covered thereby, then there is no existing appropriation from which he can be presently paid. The meaning of the language quoted is argued by the one side to clearly include plaintiff's claim, and by the other to as clearly exclude it.

This money thus appropriated stands really in the nature of a contingent fund for the better and more complete carrying out of the duties of the controller's office, touching the revenues of the State : it is to be expended for the prosecution of delinquents who have broken the revenue laws, and is for such purposes under his control, not simply as other appropriations for him to draw his legal warrants upon, but for him to direct its expenditure. The revenue laws of the State are those directed to the mode and manner of assessing and collecting moneys for the support of the Government, and in none of them—whether the general revenue law so called, or others incidentally touching the revenue question, as toll road laws, etc.—is the State treasurer mentioned, save as a passive party. To be sure, he receives the money of the State and is bound to safely keep the same ; but if he should not, he cannot be said to have broken any revenue law, generally so called, but he has violated the statute regulating his special duties as custodian of the revenues. It is evident that the words of the appropriation were used in their natural, ordinary sense, and in such the delinquents in the suit out of which this question grows, if delinquents

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they be, are not included. Such being the case, it would be unlawful for the controller to attempt to extend their meaning, or to give them a construction more liberal than legal. The mandamus is denied at plaintiff's cost.

By JOHNSON, J., dissenting :

The duties of State treasurer, in respect to the receipt and disbursement of the public moneys, are in the main defined in the several statutes of this State pertaining to the revenue, known generally as the "Revenue Laws." The failure to keep in hand the public funds, except when disbursed in pursuance of law, is an infraction of the duties of this officer, by reason of the provisions of the revenue laws. The gravamen of the charges against the representative of the deceased treasurer and his sureties, in the complaint, wherein the fees are claimed by the plaintiff without particularizing, is that the treasurer failed in the performance of these, *i. e.*, duties entailed upon the treasurer by virtue of the revenue laws. The appropriation was made to pay "for prosecuting delinquents for infraction of revenue laws." Hence it seems very certain to me that this case is one clearly covered by the appropriation; and there being an unexpended balance in such fund, and plaintiff's bill of costs having been duly allowed by the State board of examiners, the writ should issue. Wherefore, I dissent from the opinion of my associates.

REPORTS OF CASES
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF NEVADA,
JULY TERM, 1870.

EDWARD ESTES, RESPONDENT, *v.* JAMES H. RICHARDSON *et al.*, APPELLANTS.

JUROR—CHALLENGE FOR CAUSE. Where a juror on examination as to his qualifications said that he had heard something of the matter, and had an impression which it would require testimony to remove, that he had no bias and his impression was very vague, and that he had never talked with any one who pretended to know the facts: *Held*, that a challenge for cause was properly overruled.

GROUND OF CHALLENGE FOR CAUSE TO BE SPECIFIED. The grounds of challenge to jurors for cause are pointed out by statute, and a party desiring to have such challenge tried must specify the ground or grounds upon which he bases it.

APPEAL from the District Court of the Eighth Judicial District, White Pine County.

This was an action against James H. Richardson and Robert O'Keefe to recover damages for alleged conversion of certain cans of butter, coffee, lobsters, sardines, etc., worth altogether, \$665.24. There was judgment for plaintiff for the amount claimed. A motion for new trial being overruled, defendants appealed.

D. R. Ashley, for Appellants.

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Perley & Campbell, for Respondent.

By the Court, WHITMAN, J. :

The only error urged by appellant is the action of the Court upon a matter occurring on the formation of the jury, thus : One Bache, on examination as to his qualification to act as a juror, said that he had "heard something of the matter," that it would require testimony to remove the existing impression on his mind, that he "had no bias or prejudice in the matter," that the impressions upon his mind were very vague, and that he had never had any conversation "with either plaintiff or defendant in regard to the suit, nor with any one who pretended to know the facts." "Whereupon counsel for defendants objected to said juror for cause, which said objection was overruled by the Court," and thereto there was an exception taken.

The ruling of the Court was right upon the facts : right again, for that no notice should be taken of an objection so general. The statute points out several grounds of challenge for cause, and the party desiring to have such challenge tried should specify the ground or grounds upon which he bases it. (*Page v. O'Neal*, 12 Cal. 483.)

The judgment of the District Court is affirmed.

EDWARD D. SWEENEY, APPELLANT, v. WILLIAM A.
HAWTHORNE, RESPONDENT.

EXECUTION SALE—BID BY JUDGMENT CREDITOR—SATISFACTION. Where property of a judgment debtor was, on execution sale, struck off to the judgment creditor, and upon his refusal to pay, the sheriff proceeded to re-sell, whereupon the Court, on motion, ordered the judgment creditor to enter satisfaction of the judgment : *Held*, that the order was error and must be set aside.

WHEN JUDGMENT CREDITOR MAY BE ORDERED TO SATISFY JUDGMENT. It is only when a judgment is satisfied "otherwise than upon execution" (Practice Act, Sec. 210) that a Court may order the judgment creditor to make acknowledgment of that fact.

MERE STRIKING OFF TO JUDGMENT CREDITOR NOT SATISFACTION OF EXECUTION. Where, on an execution sale, the judgment creditor bid in the property but

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refused to pay, and the property had to be offered again: *Held*, that the execution was not satisfied.

PURCHASE WITHOUT PAY BY JUDGMENT CREDITOR AT EXECUTION SALE. When a judgment creditor, to whom property is struck off at execution sale, refuses to consummate his purchase, there should be a re-sale under the provisions of sections two hundred and twenty-six and two hundred and twenty-seven of the Practice Act, the same as in the case of any other purchaser.

PAYMENT ON PURCHASE BY JUDGMENT CREDITOR. Where the judgment creditor is the purchaser at execution sale, it does not follow that he need not pay any money—the officer may require payment when fees are due, or to become due to him, and in default of payment may re-sell.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The judgment against the defendant was for \$846.22 and costs. The execution was levied upon certain lots of land and the "Cold Spring Water Works," in Carson City. Sweeney bid off Hawthorne's right, title and interest in the water works for \$250, but refused to make any payment thereon, whereupon the motion which is the subject of this appeal was made.

A. C. Ellis, for Appellant.

I. The Court acquired no jurisdiction over the person of Sweeney. If the judgment was satisfied, in whole or in part, it was upon execution. (Practice Act, Sec. 210.) This being the case, the proceeding should have been instituted against the sheriff for failure to make a proper return, or against the clerk for failure to make the proper entry in the docket. As to Sweeney, the whole proceeding is *coram non judice*.

II. The judgment should not be credited with the two hundred and fifty dollars, because there was no sale to Sweeney for that or any sum. To constitute a sale within the meaning of the law, cash should be paid to the sheriff if he require it, or credit should be given the judgment debtor, if the purchaser be the judgment creditor, by and with the consent of both the sheriff and the purchaser; and unless one or the other be done, it is incomplete, and not a sale. (5 Cal. 66; 6 Cal. 91.)

III. The return of the sheriff shows that Sweeney refused, ever since the bid, to pay cash, or to consent to a credit upon the judg-

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ment. In such case the statute provides the remedy. (Practice Act, Sec. 226.) And as a matter of fact, the sheriff, in pursuance of this remedy, had, when this motion was made, re-advertised the identical property, and was about to sell the same, with the object of holding Sweeney for the difference between the sum obtained and his bid, if there should be any.

IV. The sale of property on execution to satisfy a judgment is strictly a statutory proceeding, and the sale and all incidents connected with proceedings under execution must be governed and regulated by statute; and when it provides a remedy for a default in payment, or other thing connected with sale on execution, this remedy is exclusive of all others. (1 Kent, note 467; *Dudley v. Mayhew*, 3 Comstock, 15.)

Clarke & Wells, for Respondent.

I. Sweeney as assignee stands in the shoes of Woodburn in all respects. (12 Cal. 257.)

II. The property was sold and bid off by Sweeney, the assignee, and returned by the sheriff as sold to Sweeney. (3 Wend. 637; 1 Cow. 622; 1 Barb. 238; 36 Barb. 250; Nash Pr. & Pl. 600; 21 Wend. 169; 17 Johnson, 332; 2 Blackf. 1; 8 Blackf. 575; 15 Ind. 134; 2 Bl. Com. 413.)

By the Court, LEWIS, C. J.:

Sweeney, the assignee of a judgment obtained by one Woodburn against Hawthorne, directed the issuance of an execution under which certain property of defendant was seized by the sheriff. At the sale, Sweeney being the highest bidder, the property was struck off to him, but as appears by the return of the officer he refused to pay the bid; whereupon the sheriff again proceeded to sell in accordance with Sections 226 and 227 of the Practice Act. The defendant thereupon moved for an order compelling Sweeney to acknowledge satisfaction of the judgment. The Court made the order, and Sweeney appeals.

Section 210 of the code declares that "satisfaction of a judgment may be entered in the clerk's docket upon an execution re-

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turned satisfied, or upon an acknowledgment of satisfaction filed with the clerk, made in the manner of an acknowledgment of a conveyance of real property by the judgment creditor, or within one year after the judgment, by the attorney, unless a revocation of his authority be previously filed. Whenever a judgment shall be satisfied in fact otherwise than upon execution, it shall be the duty of the party or attorney to give such acknowledgment, and upon motion the Court may compel it or may order the entry of satisfaction to be made without it."

In this case it is not claimed nor attempted to be shown that there was any satisfaction of the judgment "otherwise than upon execution." If there were any satisfaction whatever, it is admitted to be by levy upon, and sale of property by the sheriff under execution. The case then does not come within the last clause of the section above quoted. It would therefore seem to be beyond the authority of the Court to compel satisfaction of the judgment in the manner here attempted. It is only when the judgment is satisfied "otherwise than upon execution" that the Court may order the judgment creditor to make acknowledgment of that fact. If the sheriff had returned the execution satisfied, the proceedings should be against the clerk; if as a matter of fact it be satisfied upon execution and no such return be made, the remedy is against the officer. Hence we cannot understand how in a case of this kind the Court can order the judgment creditor to acknowledge satisfaction.

But the return by the sheriff shows that the execution is not satisfied; the sale to Sweeney not being consummated by the payment of the money bid; and so the officer had the right to re-sell under Sections 226 and 227, which declare that, "If a purchaser refuse to pay the amount bid by him for property struck off to him at a sale under execution, the officer may again sell the property to the highest bidder, after again giving the notice heretofore provided; and if any loss be occasioned thereby from the purchaser refusing to pay his bid, the officer may recover the amount of such loss with the costs for the benefit of the party aggrieved by motion upon previous notice of five days to such purchaser, before any Court of competent jurisdiction; and Section 227 declares that "such Court shall proceed in a summary manner in the hearing and disposition

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of such motion, and give judgment and issue execution therefor forthwith, but the refusing purchaser may claim a jury."

Here is a course plainly marked out for the officer in all cases where the purchaser refuses to consummate his purchase. Why should he not be permitted to pursue it here? He certainly has the right, if it be not his duty, to follow the course designated in these sections. There is no showing whatever that to pursue it in this case would prejudice Hawthorne. But counsel argue that where, as here, the judgment creditor is the purchaser, no money need be paid, the bid itself authorizing the officer to return the execution satisfied. This however may not always be so, for that officer himself often has a claim upon a portion, if not all of the sum bid, for his fees. When he has such claim, can it be said that he cannot demand the payment of money, at least to the extent of his costs? Certainly not; and it is not unfrequently the case that the costs are equal to the sum bid. Cannot he in such case demand the entire sum, and if refused, proceed to re-sell? It is clear he may.

In this proceeding it is not shown that the officer's fees do not equal the sum bid by Sweeney; nor is there any showing or attempt at it, that if a re-sale took place Hawthorne would be prejudiced by it. It appears, it is true, that the officer had sufficient money in his hands to pay all accruing costs; but the inference from this statement is that there was not sufficient to pay costs already accrued, nor can there be any presumption upon such showing as is made here that they had been paid. It devolved upon Hawthorne to make a sufficient showing to entitle him to the order made in his favor. And one fact essential to such showing was that the sheriff had no right to claim the payment of the bid. Until that be made to appear, the showing was not made, and therefore he failed to make out a case entitling him to the order.

It must be set aside. Such is the order of this Court.

McBeth v. Van Sickle.

D. N. MCBETH AND R. W. BOLLEN RESPONDENTS, v.
HENRY VAN SICKLE, *et al.*, APPELLANTS.

PARTIES PLAINTIFF IN SUIT ON REPLEVIN BOND—DEMURRER FOR MISJOINDER. An action on an undertaking given to the sheriff upon the return of property replevied, (Practice Act, Sec. 104) should be brought in the name of the real party in interest; and where the name of the sheriff was joined with his as plaintiff: *Held*, that the complaint was clearly demurrable for misjoinder of parties plaintiff.

SHERIFF NOT INTERESTED IN REPLEVIN BOND. Though Sec. 104 of the Practice Act requires the undertaking given on return of property replevied to be delivered to the sheriff, the officer has no interest in it, and is not a proper party plaintiff in a suit on it.

PERSONS WITHOUT INTEREST NOT TO BE PLAINTIFFS. While the Practice Act (Sec. 12) declares that all persons having an interest in the subject of an action, and in obtaining the relief demanded, may be joined as plaintiffs, the converse of the proposition is also true, that none can be united who have not such interest.

APPEAL from the District Court of the Second Judicial District, Douglas County.

The plaintiff McBeth having commenced a replevin suit in the Second District Court against O. C. Wade for certain horses and cattle, and the sheriff Bollen having taken them into his possession under the replevin writ, the undertaking upon which this action was based was given by the defendants, Henry Van Sickle and J. W. Duncan, and the property replevied was thereupon delivered back to Wade. McBeth having recovered judgment against Wade, and no satisfaction thereof had, this action was commenced against the defendants. The undertaking was in the sum of \$2,050 gold coin, a little more than twice the value of the property replevied.

Clarke & Wells, for Appellants.

Bollen has no interest in the matter. True, the undertaking sued upon ran to him, but the judgment set out in the complaint was in favor of McBeth only. Bollen was not damnified in any way. Were he, alone or conjointly with McBeth, to recover, his recovery would only be in trust for McBeth. Such actions as this must be brought "in the name of the real party in interest." (Practice

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Act, Sec. 4; 7 Cal. 551; 29 Cal. 194; 18 Cal. 126; 10 Cal. 347; 2 Nev. 139; 11 Ind. 369, 385; 10 Ind. 205, 226; 9 Ind. 391; 6 Ind. 309; 8 Blackford, 243.)

Clayton & Davies, for Respondents.

Although there was no necessity to join Bollen, the sheriff, as a party plaintiff, still the joining of him as party plaintiff did not vitiate the complaint, as he was the party to whom the defendants acknowledged themselves bound for the use and benefit of McBeth. It is no objection to the complaint that Bollen was, or was not, joined; the object of the law being in all cases to make an undertaking inure to and be used for the benefit of the real party in interest, for whose security it is given.

By the Court, LEWIS, C. J. :

This action is brought upon an undertaking given in accordance with Sec. 104 of the Practice Act, which makes it the duty of an officer who has taken property in replevin to return it to the defendant upon the delivery to him by the latter of an undertaking "executed by two or more sufficient sureties, to the effect that they are bound in double the value of the property, in gold coin of the United States, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, if such delivery be adjudged, and for the payment to him of such sum, in gold coin of the United States, as may for any cause be recovered against the defendant." The instrument here sued on was delivered to Bollen, the sheriff, for the benefit of McBeth, who was the plaintiff in the action of replevin. The defendants demurred to the complaint, assigning as a ground a misjoinder of parties plaintiff. The District Court overruled the demurrer, and upon failure of the defendants to answer, rendered judgment for the plaintiff.

Nothing in the law is clearer than that the demurrer should have been sustained. Bollen, the sheriff, having no interest whatever in the undertaking, McBeth alone is the party interested as plaintiff in this proceeding. (*Curriac v. Packard*, 29 Cal. 199.) Why, then, should Bollen be united with him? The Practice Act declares that "all persons having an interest in the subject of the ac-

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tion, and in obtaining the relief demanded, may be joined as plaintiffs, except when otherwise provided in this Act." The converse of this provision, that none can unite who have not such interest, is undoubtedly the law. Bollen and McBeth having no interest in common should not have been united as plaintiffs. The demurrer should, therefore, have been sustained.

The judgment of the District Court must be set aside, with permission given the plaintiff to amend.

JOHN P. FOULKS, APPELLANT, v. CHARLES W. PEGG,
RESPONDENT.

SEIZURE BY SHERIFF OF GOODS ATTACHED BY CONSTABLE. Where a sheriff seized and sold on execution out of a District Court goods which were held by a constable on attachment out of a Justice's Court: *Held*, that the sheriff, though he was responsible to the constable, was not so to the creditor in the attachment suit.

SPECIAL PROPERTY OF OFFICER IN PROPERTY ATTACHED. An officer who has seized goods upon attachment has a special property in them, coupled with the right of possession; and any interference therewith gives him a right of action against the wrong-doer.

RIGHTS OF ATTACHMENT CREDITOR AS TO PROPERTY ATTACHED. An attachment creditor has no interest or property in or possession of the attached goods by reason of the levy, and cannot maintain an action in his own name for interference therewith against a wrong-doer, his only remedy being against the officer.

APPEAL from the District Court of the Third Judicial District, Washoe County.

The property attached by the constable and afterwards seized and sold by the sheriff consisted of some forty thousand feet of lumber lying at Verdi, in Washoe County. The aggregate amount of claims for which it was attached was between seven hundred and eight hundred dollars. This suit was for that amount and an additional sum of four hundred dollars, for traveling and other expenses alleged to be the direct result of the defendant's wrongful acts.

William Webster, and *W. M. Boardman* for Appellant, cited: *Gaulet v. Asseler*, 22 New York, 225; *Manning v. Monaghan*,

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28 New York, 585; *Yates v. Joyce*, 11 Johnson, 136; *Lane v. Hitchcock*, 14 Johnson, 213; *Gardner v. Heartt*, 3 Denio, 232.

Haydon & McElwaney, for Respondent.

By the Court, LEWIS, C. J. :

The appellant instituted several suits against one Moses Robinson, before a justice of the peace, and obtained the issuance of attachments, upon which certain lumber was seized and taken into possession by the constable. Afterwards, upon an execution issued from the District Court of Washoe County, the defendant, who is the sheriff of that county, by his deputy seized, took out of the possession of the constable, and sold the lumber attached by the latter. Executions afterwards having been issued in the suits of Foulks against Robinson by the justice of the peace, the constable returned no property could be found. The plaintiff brings this action to recover from the sheriff the value of the lumber taken by him from the possession of the constable. The facts are fully related in the complaint, to which a general demurrer was interposed and sustained by the court below. From the judgment thus rendered against the plaintiff this appeal is taken.

The demurrer was correctly sustained, for the reason that the plaintiff's right of action, if any exist, is against the constable, whose duty it was to hold the lumber attached to satisfy the judgments which might be obtained by the plaintiff. He had a special property in it coupled with the right of possession, and any interference with it gave him a right of action against the sheriff. But there is no such relation existing between the plaintiff and the sheriff, nor has the former such interest in property attached, as to authorize an action by him against one wrongfully seizing it. The law upon this question is thus stated by the Supreme Court of Massachusetts, in *Ladd v. North*, 2 Mass. 515. "Where the sheriff seizes the goods of a debtor on an execution, to make money of them to satisfy the creditor, he has a special property in the goods, and if they are taken from him he may maintain trover or trespass against the wrong-doer. The reason of the law is because

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he is accountable to the judgment creditor for a sum of money equal to the value of the goods, and it would be unjust if he could not indemnify himself by the recovery of damages for the wrongful taking. But the creditor has no interest or property in or possession of the goods by reason of the levy; and can maintain no action against the wrong-doer in his own name, his only remedy being against the sheriff.

There may be no fault chargeable upon the constable, still it is no defense against the claim of judgment creditor. Nor can he in such case suffer injury, for he has his remedy against the sheriff. We can conceive of no ground upon which the judgment creditor can maintain an action against the trespasser, a wrong-doer, when in contemplation of law the trespass or wrong is against the officer from whom the property is taken.

The judgment of the Court below must be affirmed.

THE STATE OF NEVADA, RESPONDENT, v. PATRICK DUFFY, APPELLANT.

CRIMINAL LAW—CHARGE—ASSUMPTION OF GUILT. Where in charging the jury in a criminal case, the Court used the expression, "the guilt of the defendant rests upon what is known as circumstantial evidence": *Held*, that there was a direct assumption of the guilt of defendant, and therefore manifest error.

CHARGING JURY IN RESPECT TO FACTS. The assumption by a judge in his charge in a criminal case, that any material fact upon which there is any conflict of evidence is proved, is error.

CONSTITUTIONAL LAW—JUDGES NOT TO CHARGE AS TO FACTS. The provisions of the Constitution, (Art. VI, Sec. 12) that "Judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law," whether it be wise and wholesome or not, must be fully enforced both in letter and spirit.

USE OF EXPRESSION "GUILT OF DEFENDANT" IN CRIMINAL CHARGE. Where in a criminal case, the Court in charging the jury said, "the guilt of the defendant rests upon circumstantial evidence": *Held*, that although evidently what was intended to be said was that the *charge* of guilt rested on circumstantial evidence, yet the words expressed a totally different meaning and constituted fatal error.

APPEAL from the District Court of the Eighth Judicial District, White Pine County.

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Defendant, together with A. Strauss, T. B. Stewart, Frank Weidenholdt, G. D. Hauser and A. S. Prior, was indicted in White Pine County, February, 1870, of the crime of grand larceny, in stealing five oxen, the property of W. C. Reeves and R. W. Bunington. Being tried separately, defendant was convicted and sentenced to imprisonment in the State prison for the term of three years. A motion for new trial having been overruled, this appeal was taken.

Garber & Thornton, for Appellant.

Robert M. Clarke, Attorney General, for Respondent.

By the Court, LEWIS, C. J. :

In the submission of this matter, which is a prosecution for grand larceny, the Court below charged the jury as follows :

"In this case the guilt of defendant rests upon what is known as circumstantial evidence. Evidence of this kind may be defined to be all the facts surrounding the taking of the cattle and disposal of the property, tending to point out with reasonable certainty the person who is guilty. When the facts and circumstances all point one way and to the guilt of the person charged with the offence, to the exclusion of every other reasonable hypothesis, such evidence in the very nature of things is as conclusive of guilt as the testimony of witnesses who swear directly to it ; and in criminal cases it is frequently the only kind of evidence by which crime is detected and criminals convicted."

In the first sentence of this instruction, it will be observed the Court below directly and unequivocally assumes the guilt of the defendant, and then proceeds to give the jury some information touching the character of the evidence adduced against him. The assumption by the judge in his charge in a criminal case, that any material fact upon which there is any conflict of evidence is proven, is manifestly error under the constitution and decisions of this State. It was deemed proper by the framers of our constitution to remove the jury beyond the reach of any influence of the Judge in the determination of all issues of fact : hence the adoption of section twelve of article six, which enacts that "Judges shall

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not charge juries in respect to matters of fact, but may state the testimony and declare the law." Of the policy of placing such a restriction upon the province of a judge we have nothing to say; whether commendable or otherwise is a question which does not concern this Court; but being the supreme law of the State, it must be enforced in letter and spirit as fully as if it were in every respect wise and wholesome. Upon this question Mr. Justice Baldwin, in *The People v. Williams*, 17 Cal. 142, makes these observations, which are pertinent here. "The word *victim* in the connection in which it appears, is an unguarded expression, calculated, though doubtless unintentionally, to create prejudice against the accused. It seems to assume that the deceased was wrongfully killed, when the very issue was as to the character of the killing. We are not disposed to criticise language very closely in order to reverse a judgment of this sort, but it is apparent that in a case of conflicting proofs, even an equivocal expression coming from the Judge may be fatal to the prisoner. When the deceased is referred to as 'a victim' the impression is naturally created that some unlawful power or dominion had been exerted over his person. And it was nearly equivalent in effect to an expression characterizing the defendant as a criminal. The Court should not, directly or indirectly, assume the guilt of the accused, nor employ equivocal phrases which may leave such an impression. The experience of every lawyer shows the readiness with which a jury frequently catch at intimations of the Court, and the great deference which they pay to the opinions and suggestions of the presiding judges, especially in a closely balanced case, when they can thus shift the responsibility of a decision of the issue from themselves to the Court."

But in this instruction, the Court tells the jury that Duffy is guilty of the crime charged upon him. "The guilt of the defendant rests upon circumstantial evidence," is an expression which clearly assumes the charge to be proven against the defendant. It is an assumption of the establishment of all the issues against him. It is in effect a statement that Duffy is guilty; if not, how can his guilt rest upon circumstantial evidence? Evidently, what was intended to be said was, that the *charge* against the defendant rested

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upon circumstantial evidence ; but unfortunately the words employed express a totally different meaning.

The instruction is erroneous and therefore the judgment must be reversed.

THOMAS H. WILLIAMS, *et al.*, RESPONDENTS, *v.* JOHN W. KELLER, APPELLANT.

DISCRETION AS TO CHANGE OF PLACE OF TRIAL. As a general rule, the matter of change of place of trial is within the discretion of the Court ; but when the motion to change is made on the ground of the residence of defendant, (Practice Act, Sec. 20) there is no room for the exercise of discretion.

DEFENDANT'S RIGHT OF TRIAL AT HIS RESIDENCE. A defendant who comes within the purview of Sec. 20 of the Practice Act is entitled, as a matter of right, to have an action against him tried in the county of his residence ; the statute is peremptory.

CONVENIENCE OF WITNESSES. Where a suit to recover money was brought in Storey County, against a resident of White Pine County, and defendant moved on the ground of his residence to change the place of trial to White Pine County: *Held*, that he had an absolute right, under the Practice Act, (Sec. 20) to the change, and that counter affidavits to retain the case on account of the convenience of witnesses constituted no defense and could not be considered.

"MOTION TO RETAIN PLACE OF TRIAL." There cannot properly be any such practice as an affirmative motion to retain a cause for trial ; everything usually called so is only matter of defense to a motion for a change.

CONTESTING DEFENSE NO WAIVER OF RIGHT TO CHANGE OF PLACE OF TRIAL. Where a defendant in a proper case moves to change the place of trial to the county of his residence, he has an absolute right to such change ; and the mere fact that he files counter affidavits and contests an effort to retain the cause on the ground of convenience of witnesses, will not amount to any waiver of his right.

WAIVER NOT PRESUMED EXCEPT IN CLEAR CASE. The legal presumption of a waiver of any right by a litigant will not be drawn except in a clear case, and especially not when to allow such a presumption would be to deprive a party of his day in Court.

EFFECT OF MOTION TO CHANGE PLACE OF TRIAL FOR RESIDENCE. Where a defendant in a proper case moves to change the place of trial to the county of his residence, the Court is by force of his motion ousted of all jurisdiction in the cause, except to decide upon the proposition of his residence at the time of the commencement of the action, and to transfer the case.

APPEAL from the District Court of the First Judicial District, Storey County.

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The action was by Thomas H. Williams and David Bixler, attorneys at law in Virginia City, to recover one thousand five hundred and fifty dollars in legal tender notes for legal services, being ten per cent. agreed to be paid on moneys received by defendant on certain indebtedness held by him against Virginia City.

Mitchell & Stone, for Appellant.

I. Defendant had a right to have the action tried in the county of his residence. Upon the application made, the Court ought not to have considered any matter or thing other than the question of residence, because that alone was the subject of consideration. The California authorities upon this question are inapplicable, for the reason that our statute (Sec. 21) contains an entire clause not in the California statute (Sec. 21). It is apparent from our Practice Act that defendant's right of trial in the county of his residence is waived *unless the demand in writing is made before the time for answering expires*; but if demand is made in time, as in this case, the right is absolute.

Willims & Bizler, for Respondents.

I. Leaving out of the argument the point that our Practice Act was modeled after that of California, and that we should pay respect to the decisions of the California Supreme Court in reference to it, we submit that the granting or refusing a motion to change the place of trial is a matter of discretion. The Court should not, therefore, be held to have committed error in following a convenient and sensible practice, especially when counsel for both sides assumed it to be the correct and proper practice, and voluntarily adopted it. By the New York system, the venue must be changed to suit the residence of defendant, and after the change has been made, the plaintiff must apply to the Court to which it was changed to change it back again to the Court to which it was taken on the ground of the convenience of witnesses.

Under the practice maintained in California and adopted in this case, the whole matter may be determined at the first hearing, greatly to the convenience of the parties, and saving them from expense and delay.

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II. The defendant having appeared to and resisted our motion by counter affidavits, without objection to the jurisdiction of the Court to hear the motion, waived all objections if any existed.

By the Court, WHITMAN, J. :

On the ninth of September, 1870, respondents filed their complaint against appellant in the First District Court, Storey County. On the thirteenth of the same month, he was duly served in the action in the County of White Pine, in the Eighth Judicial District. On the twenty-second day of the month aforesaid, appellant, by his attorneys, made demand that the place of trial of the cause be changed to White Pine County, his residence, and notified respondents that he would on the twenty-eighth of the said month move therefor in open Court, upon his affidavit of the fact accompanying the notice.

Thereafter, respondents filed and served notice that they would resist the motion, and also themselves move to retain the cause for trial in Storey County, on the ground of the convenience of witnesses. This notice was also accompanied by affidavits; they were answered by appellant; respondents thereto replied, and appellant asking further time to file additional affidavits, was refused.

Upon hearing, the Court made the following order. * * *
"The Court now orders that said motion be, and the same is hereby overruled and denied." On the thirtieth of November following, the default of appellant was entered, and on the same day judgment was rendered for the amount claimed in the complaint. From this judgment the present appeal is taken, various specifications of error being assigned. These will not be particularly examined, as they are mostly pointed to matters which were in the discretion of the Court, provided it was properly exercising jurisdiction in the case.

With respect to cases of the nature of the present, the code of practice in this State, provides, that * * * "The action shall be tried in the county in which the defendants, or any one of them, may reside at the commencement of the action. * * *
If the county designated for that purpose in the complaint be not the proper county, the action may notwithstanding be tried therein,

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unless the defendant before the time for answering expire demand in writing that the trial be had in the proper county, and the place of trial be thereupon changed by consent of parties, or by order of the Court, as is provided in this section. The Court may, on motion, change the place of trial in the following cases: First. When the county designated in the complaint is not the proper county." * * * It is also further provided, thus: Third. "When the convenience of witnesses and the ends of justice would be promoted by the change." * * * (Statutes of 1869, 199, Secs. 20, 21.)

As a general rule, change of place of trial is eminently within the discretion of the Court to which the motion is addressed; but when the motion is made under the peculiar language of the statute cited, on the ground of residence, there is no room for the exercise of discretion. The statute is peremptory in that regard, and the party making such motion is entitled to have the same granted, that he may plead or take such other action as he may be advised; and to that end, it is his privilege to have the ruling and decision of the judge of the place of his residence, upon any question arising subsequently to the necessary order, upon his demand and motion.

Why the Legislature should have made this special provision is perhaps not so clear; and upon a somewhat similar statute, and in a case resembling the present, it was said in New York that it would seem to be an idle ceremony to change the place of trial of a case which would probably have to be immediately returned; but of that neither this Court nor the District or other Court, where the original motion is made, can judge. When, as in the present action, it is clear that the mover comes within the language of the statute, he is entitled to his order for change, and any subsequent proceeding should be had in the Court to which the cause is transferred.

To the motion and affidavit of appellant, the counter motion (if counter motion it be) and affidavits were no defense. They raised an irrelevant issue, and one which the First District Court had no right to consider. The appellant had no need to answer such affidavits, but having done so, he should not be made to suffer for an

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act of mere surplusage; one which he evidently—and so the District Court, judging from its order in the premises—thought a proper part of his original motion.

There can properly be no such practice as an affirmative motion to retain a cause in a certain county for trial; this is matter of defense, and though from some portion of the language of respondents' notice, it would follow that they proposed making an affirmative motion, yet to call it so could not change its real nature; and so the District Court in its order only rules upon the motion of appellant, treating all the affidavits as pertaining to that. Thus much has been said, because it is claimed that appellant, by filing affidavits and making contest upon the question of the convenience of witnesses, thereby waived his right to object to the decision of the District Court thereon, and consequently is bound thereby. The legal presumption of a waiver of any right by a litigant will not be drawn except in a clear case; and especially so when to follow such a presumption would be to deprive a party of his day in Court.

Here the appellant is found all the time insisting on his original demand, and though doing more than he needed, by filing affidavits as to the convenience of witnesses, yet this was clearly upon the hypothesis that such action was of some avail as to the primary question. To hold that he at any time waived his first demand, would be to force an illegitimate inference from the circumstances.

When appellant's original motion was made, the District Court of the First District was by force thereof ousted of all jurisdiction over the person of appellant and the subject matter of the suit, except to decide upon the one proposition of the residence of appellant at the time of the commencement of the action. That found in favor of appellant, the order for change of place of trial necessarily and conclusively followed.

In considering the question of the convenience of witnesses, the District Court allowed an irrelevant issue to usurp the place of the legal and proper one. In deciding the motion of appellant upon any other consideration than that by him originally presented, the Court erred.

The default and judgment which followed the ruling on appel

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lant's motion were taken without authority and beyond the jurisdiction of the Court, and must consequently be set aside.

It is so ordered, and the cause is remanded, with directions to the First District Court to vacate all orders therein, and to make an order changing the place of trial of the case to White Pine County.

**MATTHEW CROW, APPELLANT, v. HENRY VAN SICKLE
et als., RESPONDENTS.**

COMPLAINT BY HUSBAND ON NOTE GIVEN TO WIFE. Where a complaint by a husband on a note and mortgage given to his wife, alleged that he was the owner and holder of the note and mortgage, and in another part that the note and mortgage were the common property of himself and wife: *Held*, that though there was an apparent, there was no real contradiction; that the allegation of common property was nothing more than an explanation of the character of his ownership, and that a demurrer for ambiguity would not lie.

CHOSSES IN ACTION BELONGING TO HUSBAND AND WIFE. Under the provision of the statute relating to husband and wife, (Stats. 1864-5, 240) the husband, for the purpose of bringing suits upon choses in action which are common property, and so far as the disposition of such property is concerned, is the sole owner, and he alone is the proper party to bring actions upon them.

WIFE NOT A PARTY TO ACTION TO RECOVER COMMON PROPERTY. In a suit on a note given in the name of a wife, though in fact the common property of herself and husband, she has no such interest as to make her a necessary or proper party.

PLEADING—HUSBAND'S OWNERSHIP OF COMMON PROPERTY. In a complaint by a husband to recover a chose in action given in the name of his wife, but belonging to the community, it is sufficient for him, to show his right of action, to allege either that he is the owner or that it is common property, and even both allegations in the same complaint will not render it demurrable.

PLEADING—CHARACTER OF CORPORATIONS DEFENDANT. In an action on a note and mortgage, where a corporation was made a party defendant as having some interest: *Held*, that it was not necessary to allege whether it was a foreign or domestic corporation, nor for what purpose it was incorporated.

APPEAL from the District Court of the Second Judicial District, Douglas County.

This was an action on a note for \$9,650, and interest at the rate of two per cent. per month, made by defendant Van Sickle to Mary Crow, October 26th, 1868, and a mortgage of even date to secure

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the same on the "Kinney Ranch," the "Bob Lyons Ranch" and "Van Sickle's Hotel" in Douglas County. Wells, Fargo & Co., H. F. Dångberg and J. J. Jones were made parties defendant, as having some interest in the property mortgaged subsequent to the lien of the mortgage.

R. S. Mesick, for Appellant.

I. The note and mortgage being made to the wife of the plaintiff during coverture are, by operation of law, payable to the husband, and either his property or the common property of both husband and wife, and so subject to the exclusive control of the husband. (Story on Promissory Notes, Secs. 87, 124; *Com. v. Manley*, 12 Pick. 173; *Tryon v. Sutton*, 13 Cal. 493; Stats. 1864-5, 239; *Smith v. Smith*, 12 Cal. 216; *Meyer v. Kinzer*, 12 Cal. 247; *Pizley v. Huggins*, 15 Cal. 127; *Benton v. Leis*, 21 Cal. 87; *Adams v. Knowlton*, 22 Cal. 283; *Riley v. Pehl*, 23 Cal. 70; *McDonald v. Badger*, 23 Cal. 393; *Ramsdell v. Fuller*, 28 Cal. 37.)

II. Actions concerning common property are purposely brought in the name of the husband alone, and the wife ought not to be joined with him as a party. (*Mott v. Smith*, 16 Cal. 557; *Tissot v. Throckmorton*, 6 Cal. 471.)

III. We are at a loss to understand how it can be contended with any degree of sincerity that any point in the demurrer can be sustained. The matter seems to us too plain for argument.

Clarke & Wells, for Respondents.

I. The complaint alleges the note and mortgage to be the property of the plaintiff; and then alleges them to be the property of plaintiff and wife. These averments are contradictory. Can plaintiff be allowed to try to prove one, and on failure prove the other? The allegations and proof must correspond. (24 Cal. 458; 15 Cal. 410.)

II. Wells, Fargo & Co., a corporation, are made defendants, because necessary parties to the action; but plaintiff does not allege when, where, or for what purpose incorporated, or whether a domes

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tic or foreign corporation. The complaint ought to allege these facts; and if a foreign corporation, the fact of such compliance with our laws as will enable it to do business here. (14 Cal. 457; 10 Cal. 22; 34 Cal. 48.)

By the Court, LEWIS, C. J. :

Suit to foreclose a mortgage, the complaint alleging that the note to secure which the mortgage was given was executed to Mary Crow, who it is charged was at the time of its execution and delivery, and ever since has been, the wife of plaintiff, and that the consideration upon which the note and mortgage were executed was money received by the defendant Van Sickle from the plaintiff. It is also alleged that the plaintiff is the owner and holder of the note and mortgage, and that they now are and "have ever been the common property of himself and his said wife."

The defendant Van Sickle demurred to this pleading, assigning several grounds, only two of which, however, are urged in this Court, namely: First. It is ambiguous and contradictory in this: it alleges, first, that the plaintiff is the owner and holder of the note and mortgage, and again that they are the common property of himself and wife: and second, that, as it alleges Wells, Fargo & Co., who are made defendants, to be a corporation, it should show whether a domestic or foreign corporation, and for what purpose incorporated.

At first blush the allegation respecting the ownership would seem to be a flat contradiction. When, however, taken in connection with the peculiar statute of this State respecting the common property of husband and wife, it will be observed no such contradiction exists. Section two of that law declares that "all property acquired after the marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property." And section nine of the same act provides that "the husband shall have the entire management and control of the common property, with the like absolute power of disposition as of his own separate estate." (Stats. of 1864-5, 240.) The complaint was evidently drawn with this statute in view. By virtue of it, the husband is—for the purpose of bringing suits upon choses in action

which are common property, and so far as the disposition of such property is concerned—the sole owner, and he alone is the proper party to bring actions upon them. (*Mott v. Smith*, 16 Cal. 557.) Neither in the bringing of this action nor the collection of the note, has the wife any such interest as to make it necessary for her to be made a party to the proceeding. The power of management and absolute disposition of the common property thus conferred by the statute, clothes the husband with such ownership and authority as to warrant the allegation in a complaint of this kind, that he is the owner of the chose in action. Certainly, the wife has no interest which will justify any interference on her part, nor has the defendant in such case any ground of complaint, for the plaintiff is the owner of a moiety and so far as the right of prosecuting the action is concerned, he is in effect the absolute owner of the entirety.

After alleging himself to be the owner, it was doubtless useless to go further and state that it was common property. Either allegation would evidently have been sufficient to show a right of action in the plaintiff; but if both allegations be embodied in the same pleading, we cannot perceive why it should be a cause of demurrer, for the allegation of common property is little, if anything, more than an explanation of the character of the plaintiff's ownership.

The second ground of demurrer clearly has no merit. It is charged that the concern known as Wells, Fargo & Co. has some interest in the property, accrued subsequent to the interest of plaintiff. Thus it became necessary to make it a party defendant. Whether it be a foreign or domestic corporation, and for what purpose it may have been incorporated, are matters into which the plaintiff was not bound to enquire. It was his duty to get legal service on the defendant: for the purpose of determining how to do that, it might be necessary for him to ascertain whether the corporation were foreign or domestic, but beyond that he had nothing to do with it.

The demurrer was improperly sustained. The judgment must therefore be reversed.

VOLNEY E. ROLLINS, EXECUTOR, &C., APPELLANT, v. WILLIAM H. STROUT, RESPONDENT.

DECLARATIONS OF POSSESSOR TO CONTRADICT ALLEGED GIFT OF PERSONAL PROPERTY. Where in a replevin suit for a wagon and horses, alleged to be the property of the estate of a deceased person, but claimed by defendant as a gift executed by deceased in his life-time, a witness testified that after the alleged gift he saw deceased in possession of the property, having the wagon repaired, and exercising other acts indicating ownership: *Held*, that the question, "Did the deceased tell you at that time that he was the owner of the property?" was not amenable to the objection that the evidence would be hearsay, and that to rule it out on that objection was error.

DECLARATION OF PARTY AS PART OF RES GESTÆ. Declarations made by a party to an action, if a part of the *res gestæ*, are admissible in evidence even in his own favor; but only such declarations as are a part of the *res gestæ*, such as accompany acts pertinent to the case, are so admissible.

DECLARATIONS EXPLAINING ACTS OR MOTIVES. Where the proof of acts done by a person is admissible in evidence, any declarations accompanying and tending to explain such acts, or the motives controlling them, are likewise admissible as a part of the acts themselves; and this rule is not confined to such declarations as are against the interest of the party making them.

DECLARATIONS OF DECEASED PERSONS AS PART OF RES GESTÆ. Where the issue was as to the fact of a gift having been made by plaintiff's testator and its consummation by delivery: *Held*, that acts of ownership exercised by deceased after the time of the alleged gift, and his declarations accompanying them, were part of the *res gestæ* and admissible in evidence.

APPEAL from the District Court of the Fifth Judicial District, Humboldt County.

Plaintiff was the executor of X. V. C. Rollins, deceased. The Court found that there had been a gift of the property in controversy by the deceased to F. X. Banks, as claimed in the answer, and rendered judgment in favor of defendant. A motion for new trial having been overruled, plaintiff appealed.

L. A. Buckner, for Appellant.

I. Gift executed is a question of fact, not law, and its essentials are embraced in the maxim, "*Donatio perficitur possessione accipientis.*" There must be delivery and acceptance. This has been maintained, says Kent, (2 Kent, 589) in every period of the

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English law. The delivery must be actual, so far as the subject is capable of delivery.

II. The answer to the question asked the witness Hadley, would have been original testimony—part of the *res gestæ*, not hearsay.

Williams & Bixler, also for Appellant.

The Court erred in excluding the declarations made by the deceased Rollins concerning the ownership of the horses sued for, while actually using them. Whether he was using it as property borrowed from Banks, or was using it as his own and claiming title to it, could best be ascertained by his declarations made at the time, which declarations, being explanatory of his acts, were a part of the *res gestæ*, and should have been admitted in evidence. (*Boyden v. Moore*, 11 Pick. 364; 1 Greenleaf on Evidence, 108, 110; 1 Phil. on Evidence, [4 Am. Ed.] 185, 201.)

Clarke & Wells, for Respondent.

I. There is no pretense that the conveyance of the property by Rollins, deceased, to Banks was fraudulent. The central question is, "Did Rollins, deceased, give the property to Banks?" The Court finds he did, and there is, to say the least, some evidence to support the finding—we think a preponderance; hence this Court will not reverse on that ground. (5 Nev. 415.)

II. The Statute of Frauds (Stats. of 1861, 20, Sec. 64) does not attempt to prescribe in cases of gift *when* delivery shall be made, or *how* possession shall be maintained. And as by that section provided, in case of *sale* or *assignment*, failure to *take* and *keep* possession can only be taken advantage of by a creditor, or a subsequent *bona fide* purchaser. (8 Cal. 325, 554; 13 Cal. 58; 15 Cal. 50; 5 Cal. 226, 366; 14 Cal. 576.)

By the Court, LEWIS, C. J.:

This is an action in the nature of replevin to recover certain horses and a wagon, which the appellant claims were the property of his testator, but which are in the possession of the defendant,

he holding them by purchase from one Banks who, it is alleged, received them by gift from the testator in the month of September, 1868, about one year prior to his death.

The gift was not consummated by a writing of any kind, but it is claimed by the defendant that it was fully executed by a delivery of the property to Banks. Issue was taken upon the facts. At the trial it appeared that the deceased had possession of, and exercised acts of ownership over the property long after the time when it is claimed the gift was made. T. J. Hadley, one of the witnesses on behalf of the plaintiff, testified that in June, 1869, he saw the testator in Unionville with the property in his possession; that he, the witness, repaired the wagon for him and was paid therefor by the deceased; that he saw him do other acts indicating ownership by him.

At this point counsel, after having asked if he had any conversation with deceased about the ownership of the property, put this question: "Did the deceased tell you at that time that he was the owner of the property described in the complaint." Objection being made upon the ground that the evidence would be hearsay, the Court sustained the objection and plaintiff excepted. The exception is, we think, well taken. It is a rule of evidence that declarations made by a party to an action, if a part of the *res gestæ*, are admissible in evidence even in his own favor. There are some cases wherein it is held that declarations made by one in possession of personal property are not admissible in favor of his title, whilst such as are made against his interest are. (9 Missouri, 788; 17 Conn. 399; 7 Jones, 575.) It must be confessed no solid reason in favor of such decisions is apparent. The general rule is, that when the proof of acts done by a person is admissible, any declarations accompanying them which tend to explain such acts or the motives controlling them are likewise admissible. The rule is certainly not confined to such declarations as may be made against the interest of the person making them. Such declarations are received under another rule and for different reasons. When made against interest they are received even when not accompanying such acts. Declarations accompanying acts performed are considered a part of the acts themselves. They are often called "verbal acts." Why then

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should not the declarations as well as the acts be received? Those Courts even which have held that declarations made by one in possession of property are not admissible in his own favor, do not pretend to hold that declarations so made are in no case admissible. These decisions are confined to cases where the declarations are offered to establish a title or right to property, and the reason given is that it would be dangerous to admit them in favor of *him* who *makes* them—that one should not be allowed so to make a title for himself. But why not admit his declarations as well as his acts? It is difficult to perceive why acts done by him are not equally within the reason given by the Courts as his declarations. If there be any reason why a person shall not be allowed to make a title, or establish a right in himself by his own declarations, it will apply with equal force to any acts which he may have done having the same tendency. If declarations are in any case admitted in favor of one making them, why should they not be admissible for the purpose of establishing his right to personal property, as well as to enable him to make out any other right? It is the daily practice to admit declarations of this character. Thus, in *Schenck v. Hutchinson*, (2 N. C. Law Repository, 432) which was trover for a fifty dollar bill, the plaintiff alleged that he had lost the note, proved that he had it in his possession, and it was afterwards in possession of the defendant. The plaintiff gave no evidence of the loss except his own declarations, and they were held admissible. In *Thompkins v. Saltmarsh*, (14 Serg. & R. 275) which was an action against a voluntary bailee for the loss of goods by carelessness, the bailee's declarations, made immediately after discovering the loss, were admitted in his own favor. *Banks v. Hatton*, (1 Nott & McCord, 221) was trover for three negroes. The question was whether the negroes had been given to the plaintiff by his wife's father, or only loaned to him: the declarations of the father at the time the plaintiff took them were received in his own favor to show that the transaction was only a loan. And in *Harriman et al. v. Hill*, (14 Maine, 127) the Court held that the declaration by the holder of a promissory note that it was his property was admissible. So it is the constant practice in criminal cases to receive the declarations of the prisoner, made in his own favor, when

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constituting a part of the *res gestæ*. (See cases collated—2 Cowen & Hill's Notes to Phillips' Evidence, 592 *et seq.*)

We can see no reason upon which an exception to this rule should be made against declarations respecting the title to personal property. No reasons are given in the cases where such exceptions are made, which are not as applicable to any case of declarations favoring the interest of the party producing them as to cases of this character.

But can the testator's declarations be considered part of the *res gestæ*? We think they can. The very issues between the parties being, whether a gift had been made of the property to Banks, and whether, if a gift were intended, it had been consummated by a delivery of the property. The acts of ownership exercised by deceased after the time it was claimed the gift had been made tended to disprove such gift; and the delivery and the declarations accompanying them were a part of the acts, and likewise tended in the same direction, and thus they were a part of the *res gestæ* and admissible.

It must be borne in mind, that it is only such declarations as are a part of the *res gestæ* that are admissible. Where they do not accompany an act pertinent to the case, or which is itself evidence, they are not admissible. But it may be laid down as a general rule, that in all cases where a person's acts are evidence for him, his declarations in relation to those acts made at the same time are necessarily so. Here the testator's acts—that is, his actual use and possession of the property—his employment of a mechanic to repair the wagon, together with other similar acts, were undoubtedly evidence against the case of defendant; and so the Court below regarded them, for all acts of that character were admitted; hence the declarations accompanying them should also have been.

The Court below erred in sustaining the objection interposed by counsel for defendant, and for this reason the judgment must be reversed.

Dorn v. O'Neale.

GEORGE W. DORN *et al.*, RESPONDENTS, *v.* WILLIAM T. O'NEALE, APPELLANT.

PROCEEDINGS AGAINST JOINT DEBTORS WHERE ONE BANKRUPT. In a suit against joint debtors, where one set up his co-defendant's adjudication in bankruptcy and, during a stay of proceedings until final adjudication, admitted the allegations of the complaint; and where after final adjudication plaintiff amended, set up the discharge in bankruptcy, dismissed as to the bankrupt, and on default of the other defendant, took judgment against him: *Held*, that although the proceedings in allowing the amendment were unnecessary and somewhat irregular, there was no injury to defendant and no error in the judgment.

ADMISSION OF ADVERSE ALLEGATIONS—RIGHTS OF PARTIES NOT ADMITTING. A party to the record may admit any adverse allegation and thus dispense with proof of it; though if the admission be not of a conceded fact, any other party, other than the one originally making the allegation, may make proof in opposition.

BANKRUPT PLEADING DISCHARGE PRESUMED TO INSIST ON DISCHARGE. Where in a suit against joint debtors one pleaded his discharge in bankruptcy subsequent to the commencement of the suit; and plaintiff thereupon amended his complaint, set up such discharge, dismissed as to the bankrupt, and on default of the other defendant took judgment against him; and it was objected on appeal that plaintiff had no right to assume that the bankrupt would insist on his discharge: *Held*, that plaintiff had the right to so assume and to waive proof of the fact of discharge by his amendment, and that it was no error under the circumstances to take a separate instead of a joint judgment.

APPEAL from the District Court of the Eighth Judicial District, Esmeralda County.

This was an action by George W. Dorn, M. M. English, and Joseph Demont, partners under the firm name and style of Dorn, English & Co., and G. W. Dorn & Co. against John D. Winters and William T. O'Neale, partners under the firm name and style of Winters & O'Neale, and of the Independence Mill Company, on a certain book account and various bills of exchange, amounting in all to two thousand eight hundred and one dollars and twenty-five cents, and interest. Judgment was entered February 10th, 1870, against O'Neale for the sum of three thousand three hundred and eighty-two dollars and fifty cents, principal and interest, and costs. O'Neale appealed.

Mesick & Seeley, for Appellant.

I. Plaintiffs were entitled to judgment against both defendants

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unless Winters appeared to prosecute his defense. When the case was called for trial, plaintiffs asked leave to amend their complaint by setting up Winters' discharge, and praying judgment as against O'Neale alone. To this both defendants objected, because the proceeding and discharge in bankruptcy was a defense personal to Winters, and which he might or might not avail himself of. But the Court overruled the objection and allowed the amendment. The question now arises, was it competent for the plaintiffs of their own motion, and against the joint objection of both defendants, to discontinue their action as against Winters and proceed against O'Neale, when there was no issue in the case requiring proof on the part of plaintiffs?

Where the defense of a discharge in bankruptcy arises during the pendency of an action, and the bankrupt plead it and insist on the defense, the plaintiff may enter a *nolle prosequi* as to him and proceed as to the other defendant; but if instead of insisting on his defense he waive or withdraw his plea, or abandon the defense, (and surely Winters' objection to the amendment of the complaint must be deemed a waiver of his plea and an abandonment of his defense) his co-defendant and co-debtor has as much right to insist that the plaintiff should retain the bankrupt as a defendant in the action, as that he should be made a defendant originally.

O'Neale has been injured by this action of plaintiffs in procuring a dismissal as against Winters, for had judgment been entered against both, Winters' property acquired since he went into bankruptcy, and any which he may hereafter acquire, would be subject to the payment of this partnership debt; or, if O'Neale alone should pay it, he could compel Winters to make contribution; but not so now. (*Tinkum v. O'Neale*, 5 Nev. 93.)

W. M. Seawell, for Respondents.

The defendant Winters had before the allowance of the amendment filed his answer, setting up his final discharge in bankruptcy in bar of the plaintiffs' right to recover against him, and he therefore cannot complain that plaintiffs admitted his defense to be true, and amended their complaint to conform to his answer in this respect; nor could the defendant O'Neale object to the allowance

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of such amendment, for his co-defendant Winters, by filing his answer, had made such discharge pertinent to the issue.

The amendment to the complaint having been made, defendants by declining to answer consented that the trial of the action should proceed without making or filing any answer thereto; and it being shown both by the pleadings and the evidence, that the defendant Winters had received his final discharge, judgment was properly rendered against the defendant O'Neale, and judgment of discontinuance against the defendant Winters. (*Tinkum v. O'Neale*, 5 Nev. 93.)

By the Court, WHITMAN, J. :

Respondents originally brought their action against Winters and O'Neale, as partners, upon a number of joint obligations: O'Neale answered, denying the partnership, and setting up the fact that his co-defendant had been adjudged a bankrupt, under the Statute of the United States, and praying a stay of proceedings until final adjudication thereunder. Proceedings were stayed until the final discharge of Winters, when he came in and pleaded such discharge in bar of the suit. During this interim, O'Neale had agreed upon certain facts with plaintiffs, which admitted the allegations of the complaint.

So the case stood for trial, with O'Neale's admission and Winters' answer, when plaintiffs asked and obtained leave, against the objection of both defendants, to file an amendment to their complaint, in which the discharge of Winters was set up, a judgment prayed against O'Neale, and a dismissal as to Winters. To the amendment both defendants declined to answer. The plaintiffs offered proof of the discharge, and took judgment as asked.

To this O'Neale objects and appeals, taking the ground that the allowance to the amendment, and proof thereunder, was error, and injurious error to him; because the judgment should have been joint, unless Winters had insisted upon his discharge in defense. His position is substantially, that plaintiffs had nothing to do but take judgment against both defendants under the pleadings and admissions; unless Winters insisted upon, and made proof of, his discharge.

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There is a certain plausibility about the proposition at first view, but it is more apparent than real. True, as O'Neale asserts, plaintiffs could have pursued the course suggested: true again, the course pursued by them was unnecessary, and somewhat irregular; but that does not necessarily make it error against him. That he has rights is true; so have the plaintiffs, and they may pursue any mode not legally injurious to him, to obtain them.

It is admitted in the brief of appellants' counsel, and is undoubtedly a correct proposition, that had Winters been discharged in bankruptcy before suit brought, plaintiffs need not have joined him as defendant. And had the objection of nonjoinder been made, it could have been defeated by proof of the fact of the discharge. This result obtained is practically the same. The fact of discharge arose after suit brought, but was still an existent fact before the trial; the plaintiffs pleaded it, as it in reality existed; and for the same purpose and to the same effect as they would have introduced proof in answer to a plea of nonjoinder as suggested. As has been said, this might have been unnecessary, but yet was no injury, being merely an irregular method of obtaining a legal right.

Again; it may be laid down as a general proposition, that a party to the record may admit any adverse allegation, and thus dispense with proof. The appellant would limit the proposition, by confining the effect of the admission to the party making the allegation; but it is not always possible so to limit the result. Of course, if the admission be not of a conceded fact, any person other than the party originally making the allegation admitted could make proof in opposition; but not otherwise, no matter what the effect of the admission. So in this case, the answer of Winters stood of record, and the amendment of plaintiffs was practically but an admission of its allegations. They had the right to make such admission, and if the admission was true, as in this case it was, its natural effect must follow against all parties to the record.

But, say counsel for appellant, it does not appear that Winters would have insisted upon his defense pleaded; and unless he did, judgment should have been joint, and plaintiff had no right to assume that he would so insist. In the last proposition is the error

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of appellant's argument. Plaintiffs had exactly that right. There was the answer of Winters on file. Then arose the right of plaintiffs to insist upon proof of its allegations, or to waive the same. They chose to waive and admit, in a somewhat cumbrous manner to be sure, but still with the same practical result, and with the same legal effect upon his co-defendant.

It follows then that the District Court did not err. Wherefore its judgment is affirmed.

JACOB KLEIN, RESPONDENT, v. FELICITÉ ALLENBACH,
APPELLANT.

COSTS WHERE RECOVERY LESS THAN THREE HUNDRED DOLLARS. The provision of section four hundred and seventy-eight of the Practice Act, that no costs shall be allowed when less than three hundred dollars is recovered, is obviously confined to cases in the District Courts, and was evidently adopted to prevent the bringing of actions in those Courts which should or might be instituted in Justices' Courts.

JURISDICTION OF DISTRICT COURTS—COSTS. A suit for the recovery of money may be brought in a District Court by simply claiming three hundred dollars or upwards, although less may be actually due; but if less than three hundred dollars is recovered, the plaintiff is not entitled to costs.

TEST OF JURISDICTION. The test of the jurisdiction of the District Courts in cases of money demands is the amount claimed in the complaint—the demand in controversy being the sum sought to be recovered by plaintiff, and not that for which he actually recovers judgment.

JURISDICTION OF SUPREME COURT. The language of the Constitution conferring jurisdiction upon the Supreme Court in cases of money demands, (Art. VI, Sec. 4) is identical with that respecting the District Courts, (Art. VI, Sec. 6) and whenever the District Court has jurisdiction in the first instance, the Supreme Court has jurisdiction to review its action on appeal.

WHAT CONSIDERED ON APPEAL FROM JUDGMENT. On appeal from a judgment, any error appearing in the judgment roll may be corrected in the appellate Court without a statement on appeal.

ERROR PRESENTED BY JUDGMENT ROLL. In a suit on a money demand, where the recovery was for a sum less than three hundred dollars and costs: *Held*, that the error in the judgment for costs being apparent from the judgment roll itself, might be corrected on appeal from the judgment without a statement.

APPEAL from the District Court of the Second Judicial District,
Ormsby County.

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This was an action to recover four hundred and fifty dollars, rent of certain premises known as the "Half-Way House," between Carson and Virginia City. The defendant admitted an indebtedness of two hundred dollars, and pleaded a tender of that amount, and a deposit of the same with the clerk, and offered to allow plaintiff to take judgment therefor. The Court having found an indebtedness of only two hundred dollars, and that the alleged tender was not valid, rendered judgment for two hundred dollars and costs, which, on account of attachment, keeper's fees, etc., amounted to three hundred and fifty-four dollars and fifty cents.

Clayton & Davies, for Appellant.

I. So much of the judgment as awards costs to the plaintiff is erroneous, for the reason that he recovered less than three hundred dollars. (Practice Act, Sec. 475 ; 6 Cal. 286 ; 2 Carnes', 213 ; 3 Denio, 173 ; 2 Nev. 133 ; 23 Cal. 385 ; 2 Cal. 156.)

II. The remedy by motion in the Court below is not exclusive. (20 Cal. 109 ; 2 Nev. 133 ; 1 Cal. 459 ; 7 Cal. 399.)

III. This is an appeal from the judgment, and as the error is manifest upon the face of the record, it is the duty of this Court to correct it. (4 Cal. 122 ; 34 Cal. 167 ; 31 Cal. 487 ; 12 Cal. 125 ; 4 Wend. 99 ; 5 Wend. 341 ; 8 John. 111-358 ; 12 John. 340 ; 13 John. 461 ; 14 John. 425.)

T. D. Edwards and William Patterson, for Respondent.

I. The appeal must be dismissed. No appeal lies from costs. (Practice Act, Sec. 330 ; *Howard v. Richards*, 2 Nev. 128 ; *Dempsey v. Guidon*, 13 Cal. 31 ; *Votan v. Reese*, 20 Cal. 90 ; *Zabriskie v. Torrey*, 20 Cal. 174 ; *Levy v. Gettleson*, 27 Cal. 688 ; *Larkey v. Davis*, 33 Cal. 678.)

II. Motion to strike out or retax costs or errors in the ruling of the Court, cannot be first made or excepted to in the appellate Court. (5 Cal. 410, 417 ; 6 Cal. 99, 415 ; 16 Cal. 186, 555 ; *Howard v. Richards*, 2 Nev. 128 ; *Stoddard v. Treadwell*, 29 Cal. 282.)

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III. No statement or exceptions are required to be made except upon an appeal from the *whole* judgment. (Practice Act, Sec. 332.)

IV. There was no error in the District Court in allowing costs, as the action was for the sum of four hundred and fifty dollars. Costs must be allowed to the prevailing party. (*Stoddard v. Treadwell*, 29 Cal. 282.)

By the Court, LEWIS, C. J. :

The plaintiff brought his action, and prayed judgment for the sum of four hundred and fifty dollars, but recovered only the sum of two hundred dollars, which amount the defendant admitted by her answer to be due. The District Court rendered judgment for that sum with costs. The defendant claims that no costs should have been allowed, and upon that ground takes this appeal.

It is declared by section four hundred and seventy-eight of the Practice Act, that "no costs shall be allowed in an action for the recovery of money or damages where the plaintiff recovers less than three hundred dollars, nor in an action to recover the possession of personal property, where the value of the property is less than three hundred dollars." This provision is obviously confined to cases in the District Courts, and was evidently adopted to prevent the bringing of actions in those Courts, which should or might be instituted in the Courts of the justices of the peace, which may be done by simply claiming the recovery of a sufficient amount to bring them within the jurisdiction of the upper Court, although less may be actually due. In such case, if less than that sum be recovered the conclusion is that less is due, and therefore that the plaintiff should have brought his action before a justice of the peace, where the costs are generally much less than in the Courts of record. The sum recovered by the plaintiff in this action being but two hundred dollars, he was not entitled to costs.

At the outset, however, we are met by the objection that this Court has no jurisdiction of the case, because the sum in controversy between the parties is not sufficiently large. The Constitution gives this Court, like the several District Courts of the State, jurisdiction in all cases "in which the demand (exclusive of in-

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terest) or the value of property in controversy exceeds three hundred dollars." By the demand in controversy we understand the sum sought to be recovered by the plaintiff, and not that for which he actually receives judgment. The language of the Constitution conferring jurisdiction upon this Court in cases of money demands is identical with that respecting the District Courts; and it will hardly be denied that the test of the jurisdiction of the District Court is the sum claimed in the complaint. Suppose three hundred and fifty dollars be the sum claimed in the complaint, and the defendant answer, admitting two hundred and ninety dollars, or any sum less than three hundred, to be due the plaintiff; can it be reasonably argued that the District Court would in such case be deprived of jurisdiction? Certainly not: but if the District Court has jurisdiction in the first instance, this Court has jurisdiction to review its action upon appeal, for every reason in favor of the jurisdiction of the District Court to try, applies with equal force to the jurisdiction of this Court to review. In the case of *Solomon v. Reese*, 33 Cal. 28, the Supreme Court of California, upon constitutional language precisely like ours, had this identical question under consideration, and attained the conclusion that the *ad damnum* clause in the complaint is the test of the jurisdiction of the Court.

Again, it is argued, the question of the allowance of costs cannot be reviewed upon this appeal, and the case of *Howard v. Richards*, 2 Nev. 128, is referred to as authority. We do not see that that case has the remotest bearing on the question here made. In that the point was made that costs should not have been allowed, because the cost bill was not filed within the time prescribed by statute; and we held that the question was not before the Court, the appeal being simply from the judgment, which brought up nothing but the judgment roll, and as the fact that the cost bill was not filed within the statutory time did not appear in the record so brought up, the Court refused to consider it. Here the judgment roll exhibits the fact that the plaintiff should have recovered no costs, because he obtained judgment for only two hundred dollars, and thus the error complained of is presented to the Court upon the record brought up. Upon an appeal from a judgment, any error appearing in the judgment roll may be corrected in the appellate Court without a statement on appeal.

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No other point is made by counsel which requires consideration ; we will therefore modify the judgment to the extent of striking out the costs. So ordered.

JOHNSON, J., did not participate in the foregoing decision.

A. M. KRUTTSCHNITT, RESPONDENT, v. LOUIS A. HAUCK
et als., APPELLANTS.

DEPUTY COUNTY ASSESSOR'S TERM—LIABILITY OF SURETIES. Where a county assessor on April 5th, 1867, made a writing appointing a deputy, which with the oath of office was recorded as required by statute (Stats. 1864, 184) and the deputy gave a bond for the faithful performance of the duties of his office as such deputy during his continuance therein ; and on May 9th, 1868, the assessor made a new writing of appointment of the same person, which with a new oath attached was recorded, but no new bond given: *Held*, that the second writing did not create a new term of office, and that the sureties on the bond were responsible for a defalcation of the deputy occurring at any time during the continuance of his office, though after the date of the second writing.

POWER OF COUNTY ASSESSOR TO APPOINT DEPUTIES. The power of the county assessor to appoint deputies (Stats. 1864, 143 ; 1864-5, 345) is limited only by the statutory provision (Stats. 1864-5, 346) that before such appointment he shall "divide the county into convenient districts, of which division notice shall be given to the board of county commissioners."

TERM OF LIABILITY ON BOND OF DEPUTY ASSESSOR. Where the sureties on the official bond of a deputy assessor obligated themselves for the faithful performance by the officer of the duties of said office "during his continuance therein": *Held*, that the obligation of the sureties was general, for a term solely dependent upon the will of the assessor, and which would continue, unless revoked, during his entire term.

APPEAL from the District Court of the First Judicial District, Storey County.

This was an action against Louis A. Hauck, principal, and L. B. Frankel and J. A. Winterbaum, sureties on the official bond given by Hauck on his appointment as deputy assessor of Storey County. The term of office of the assessor Kruttschnitt, by whom the appointment was made, was two years from January 1st, 1867. The defalcation of Hauck was during this term, and was for the amount

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of eleven hundred and eleven dollars and seventy cents, for which sum with interest and costs of suit, judgment was rendered against defendants. A motion for new trial being denied, they appealed.

R. H. Taylor, for Appellants.

I. The appointment of May 9th, 1868, *ipso jure*, operated as a revocation of the appointment of April 5th, 1867. (Stats. 1864, 143; *United States v. Kirkpatrick*, 9 Wheat. 720; *Rany v. The Governor*, 4 Blackf. 5.)

II. The bond was given in pursuance of the appointment of April 5th, 1867, and the liability of the sureties was confined to default of defendant Hauck, while acting under the appointment. The recital of the bond limits its condition. (*People v. Aikenread*, 5 Cal. 106; Story on Contracts, 644; *Thompson v. Young*, 2 Ohio, 334; *Bigelow v. Bridge*, 8 Mass. 275; *Rany v. The Governor*, 4 Blackf. 3; *Miller v. Stewart*, 9 Wheat. 680; *United States v. Kirkpatrick*, 9 Wheat. 720; *Lord Arlington v. Merricke*, 2 Saund. 411, 414 and note (5); *Liverpool Water Works v. Atkinson*, 6 East. 507; *Wardens of St. Savior's v. Bostock*, 2 Bos. & Pul. New Rep. 175.

III. Courts will not go beyond the fair import of the terms a surety employs in order to fasten a liability upon him. The contract of a surety is *strictissimi juris*. (*People v. Buster*, 11 Cal. 215; *People v. Breyfogle*, 17 Cal. 504; *Miller v. Stewart*, 9 Wheat. 702; *United States v. Boyd*, 15 Peters, 208; *Thompson v. Young*, 2 Ohio, 334.)

IV. The construction to be given to bonds should be that which is most favorable to the obligor. (2 Parsons on Cont. 22, note 5.)

Henry K. Mitchell, for Respondent.

I. The term of office of the plaintiff commenced January 1st, 1867, and continued until January 1st, 1869. The condition of the bond runs to the continuance in office of the deputy, Hauck. The alleged defalcations occurred during the term of office of the assessor, and the continuance in office by him of the deputy.

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II. The appointment of May 9th, 1868, was not a revocation of the appointment of April 5th, 1867, nor a new appointment for a new term; because Hauck remained in, and was discharging the duties of deputy assessor on and after May 9th, 1868, the same as before; because the assessor made the last paper only to enable the commissioners to fix the number of days for which pay should be allowed any deputy, and because the words "have appointed" in the last paper cannot be construed into a present appointment, but refer to an appointment made prior thereto.

III. The bond in suit is a common law bond. The sureties are bound by the recital which is "that if the said Hauck shall well and faithfully execute and discharge the duties of said office of deputy assessor during his continuance therein."

By the Court, WHITMAN, J. :

Respondent being the duly elected assessor for Storey County, appointed the appellant Hauck his deputy by a writing as follows :

"Know all men by these presents that I, the undersigned, Assessor of the County of Storey, State of Nevada, do hereby appoint Louis A. Hauck, of Gold Hill, county and State aforesaid, Deputy Assessor for the purpose of assisting me in assessing Gold Hill District in said county. In witness whereof, I have hereunto set my hand and seal the fifth day of April, A. D. 1867.

A. M. KRUTTSCHNITT, Assessor of Storey County."

This appointment, with the accompanying oath of office, was duly recorded as by statute provided (Stats. 1864, 143). On the day after the appointment, Hauck as principal, and his co-defendants as sureties, gave a bond for the faithful performance of his duties during his continuance in office. He continuously performed the duties of the office until the expiration of the term of his principal.

On the ninth of May, 1868, respondent made the following writing :

"Know all men by these presents that I, A. M. Kruttschnitt, Assessor of Storey County, State of Nevada, have appointed Louis

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A. Hauck a Deputy Assessor for the purpose of assisting me in assessing the property in the following district, to wit: Gold Hill District. Witness my hand this ninth day of May, A. D. 1868.

A. M. KRUTTSCHNITT, Assessor Storey County, Nev."

Which, with the accompanying oath of Hauck, was duly recorded.

This suit is brought to recover certain moneys, of which Hauck was in default, which defalcation occurred after the date last named.

Respondent recovered in the District Court, and this appeal is taken from such judgment, upon the assumption that the sureties are responsible only for any breach occurring before the date last aforesaid, it being contended that the writing of that date inaugurated a new term of office, to which the bond given had no reference.

If the premise be correct, the conclusion claimed by appellants follows, although the language of the bond is general; as such may be limited and restricted by the recital, by the subject or by facts, which, when applied to the language used, show that it must have been so understood by the parties. And to this effect are the authorities cited by counsel for appellant.

But as is said by Shaw, C. J. in *Amherst Bank v. Root et al.*, 2 Met. 540: "The cases where it has been held that the generality of the words of an obligation may be restrained and modified, are of two classes; first, where there is a preamble or recital, stating directly or by implication the intent and purpose of the parties to the bond; or secondly, where it is a stipulation for fidelity in office, and it appears by the nature and condition of the office that it was limited to a particular time."

This case comes within neither of the exceptions noted. The assessor had the power to appoint deputies, limited only by the statutory provision that before such appointment he should "divide the county into convenient districts, of which division notice shall be given to the board of county commissioners." This was done before the first appointment, and the only reason for the second appointment seems to have been that he was directed by the commissioners to re-district the county, and upon so doing, made what is called the re-appointment of Hauck.

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So far as any examination of that part of the case has been made, the order would appear to be unauthorized, and the re-appointment superfluous; but whether that be so or not cannot affect the main question of the liability of the sureties; their obligation was in general terms for the faithful performance by Hauck of "the duties of the said office of deputy assessor," during his continuance therein. There was no express limitation of the effect of this general language and none can be inferred; as the term of his continuance was not fixed by any law, or other limitation, but was solely dependent upon the will of his principal, who willed to continue him during his entire term. (*Exeter Bank v. Rogers*, 7 N. H. 21; *Dedham Bank v. Chickering*, 3 Pick. 335; *Amherst Bank v. Root*, 2 Met. 522; *Hughes v. Smith*, 5 Johns. 168.)

The judgment herein is correct, and is affirmed.

JOHNSON, J., did not participate in the foregoing decision.

REPORTS OF CASES
DETERMINED IN THE
SUPREME COURT
OF THE
STATE OF NEVADA,
OCTOBER TERM, 1870.

PETER BRANDOW, RESPONDENT, *v.* THE POCOTILLO SILVER MINING COMPANY, APPELLANT.

MORTGAGE ON POCOTILLO MINE—DESCRIPTION EXPLAINED IN CONTRACT. Where a controversy arose between Brandow and the Pocotillo Silver Mining Company as to the ownership of eight hundred feet of mining ground, and on an amicable settlement a contract was entered into between them, in which, after reciting the controversy as to the said mining ground "known as the Pocotillo mine," Brandow agreed to convey to the company all his right, title and interest in "said claim or mine," and the company agreed, among other things, to pay Brandow fifteen thousand dollars, and that the contract should "operate as a lien by way of mortgage upon said mine" to secure the same: *Held*, that the mortgage was only to be upon the mining ground in controversy and not upon the Pocotillo mine in fact, which embraced much more ground.

DESCRIPTIONS TO BE UNDERSTOOD AS USED AT TIME OF CONTRACT. Where the words "Pocotillo mine" were used in a contract to designate certain mining ground therein specifically described: *Held*, that it could not be claimed that a larger tract of ground, afterwards known as the Pocotillo mine, was intended.

APPEAL from the District Court of the Eighth Judicial District, White Pine County.

The plaintiff had judgment in the Court below for a foreclosure of his mortgage as against the entire eighteen hundred feet of min-

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ing ground claimed by him to be "the Pocotillo Mine." A motion for new trial having been overruled, defendant appealed.

Garber & Thornton, for Appellant.

I. The recitals of the contract are controlling and conclusive on the question of construction. They are, that defendant claims to be the owner of certain mining ground known as the *Pocotillo mine*; that plaintiff claims to be the owner of the *same ground* and two hundred feet additional; that there has been a dispute between plaintiff and defendant as to the ownership of *said ground*, each claiming adversely to the other; that there has been litigation between them to determine the ownership of *said mining claim*; that it is agreed that plaintiff shall convey to defendant all his right, etc., to *said mine*; and that defendant does *inter alia* mortgage to plaintiff *said mine*.

No mistake being alleged and no reformation sought, the plain and unambiguous terms of the writing must be enforced. The intention is deemed to be what the language expresses.

The Court sits to enforce, not to make contracts. Nothing inconsistent or incompatible with the written words can be deemed to have been intended; no parol testimony is admissible, or if admitted, available to alter or vary the written terms of the contract; and effect must be given, if possible, to every term of the writing.

The case stands as if defendant had mortgaged the mine described in a certain deed, and that deed had described the eight hundred feet north. (*Vance v. Fore*, 23 Cal 435; *Jonas v. Johnson*, 18 How. U. S. 150.)

II. Brandow's testimony cannot be received against the language of the written recitals. If the defendant had simply mortgaged the Pocotillo mine, parol testimony would be admissible to show the subject matter, what was the Pocotillo mine; but this mortgage has dispensed with such testimony or the need of it—has rendered it unavailing—for it goes on in the writing itself and defines the meaning of the words "Pocotillo mine," itself identifies the subject matter by reference to other facts and documents. The recitals in the writing must prevail over all parol testimony in

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conflict with it. (*Duke v. Errington*, 5 T. R. 522; 2 Parsons on Contracts, 502, note; 3 Washburn on Real Property, 639; *Allen v. Holton*, 20 Pick. 464; *Richardson v. Scott R.*, *fc.*, 22 Cal. 150; *Donahue v. McNulty*, 23 Cal. 417; *Morrill v. Fischer*, 4 Exch. 591; 2 Parsons on Contracts, 552.

Aldrich & Wren, for Respondent.

I. There is no room for construction. The "Pocotillo mine," whatever that may be, was intended. This description in itself was sufficient to warrant a foreclosure and sale without giving the particular boundaries; but to render it entirely certain, resort was had to averment and parol proof as to what was known as the "Pocotillo mine."

The agreement describes the property affected as the "Pocotillo mine." The complaint avers and describes it, and the answer does not deny that the description given is a correct description of the "Pocotillo mine." The answer in effect admits the correct description of the "Pocotillo mine," but claims that it is not a description of the ground which the parties to the agreement intended to describe.

II. If there is any question in this case, it is whether the mortgage should not be restricted to the eight hundred feet south of the monument. If there is any "Pocotillo mine," strictly speaking, it is this. But, as is shown by the testimony, the whole was embraced in the general designation.

III. The findings, though not conclusive, should protect the respondent on appeal. It is beyond dispute correct, as matter of law, as well as of fact, that if the agreement referred to be considered alone, or in connection with the testimony of the description known as the "Pocotillo Mine," the whole eighteen hundred feet should be embraced by the judgment. But taking into consideration the other testimony, the case upon this point presented a question of fact, not of law. (*Stephens v. Hollister*, 3 Washburn, 294; *Williston v. Morse*, 10 Metcalf, 17; *State of Nevada v. Yellow Jacket S. M. Co.*, 5 Nev. 415; *Lewis v. Covillaud*, 21 Cal. 178; *Morse v. Murdoch*, 26 Cal. 514.)

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By the Court, WHITMAN, J. :

This action was for the foreclosure of a mortgage upon certain mining property ; and the sole question presented for review is as to the extent of ground which should be covered by the decree. The appellant's grantors, upon the twenty-sixth of May, 1868, made a location of mining ground, the notice whereof appears in the books of the mining recorder, thus :

" We, the undersigned, claim eight hundred feet (800) on this quartz ledge, together with all dips, spurs and angles, running in a southerly direction from this monument ; two hundred feet for discovery and two hundred feet each by location. We also claim one hundred feet on each side of the ledge for mining purposes. This shall be known as the Pocotillo Ledge and Belmont Company."

On the twenty-eighth of December, of the same year, respondent's grantors made their location, which appears on the records, thus :

" This is to certify that we, the undersigned, do locate and claim the first northern extension of the Pocotillo mine, claiming one thousand feet, with all the privileges of the White Pine District. This claim shall be known as the First Northern Extension of the Pocotillo Mine, District of White Pine, Lander County, State of Nevada."

Subsequently, a dispute arose and litigation ensued between the present parties, growing out of the claim of appellant that there was a mistake in the record of its grantor's notice ; and it should have read, running in a northerly direction from the monument, instead of " in a southerly direction," as on the records. This litigation was compromised, and an agreement was executed between the parties, as follows :

" Whereas, the Pocotillo Silver Mining Company, a corporation organized under the laws of the State of California, claims to be owner of certain mining ground situated in the county of White Pine, State of Nevada, known as the Pocotillo mine ; and whereas, Peter Brandow claims to be the owner of the same ground and two hundred feet additional ; and whereas, there has been a dispute between the said parties as to the ownership of said ground, each

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claiming adversely to the other ; and whereas, litigation has ensued between the said parties to determine the ownership of said mining claim, which litigation is not yet disposed of. Now, therefore, it is hereby covenanted and agreed by and between the said Pocotillo Silver Mining Company of the one part, and the said Brandow of the other part, as follows : That the said Brandow shall convey to the said Pocotillo Silver Mining Company all his right, title and interest in and to the said claim or mine. That in consideration of such conveyance, the said Pocotillo Mining Company shall, immediately upon the execution hereof, deliver to the said Brandow five hundred shares of the stock of said company, (the whole number of shares being four thousand) properly transferred on the books of the company to him the said Brandow or his assigns. That the said Pocotillo Silver Mining Company shall deliver to said Brandow the first fifteen thousand dollars, in gold or silver coin, that shall be produced over and above working expenses from said mine, or the ores thereof now extracted, whether the same shall be reduced by said company or the ores sold at the dump for coin. It is further agreed, that upon the execution and delivery hereof, the said Pocotillo Silver Mining Company shall pay to the said Brandow one thousand dollars in gold coin.

“ And for the faithful performance and fulfillment hereof, these presents shall operate as a lien, by way of mortgage, upon said mine and the ores thereof, and may be enforced in law or equity as such, the said Pocotillo Silver Mining Company hereby granting and conveying said mine to said Brandow as a security for the fulfillment hereof.

“ And the said company further covenant and agree, that it will within thirty days commence to extract ores from said mine, and diligently prosecute the workings thereof, and that it will with all reasonable dispatch pay off the said sum of fifteen thousand dollars aforesaid, out of the net proceeds of said mine, as aforesaid.

“ And if said sum of fifteen thousand dollars shall not be paid on or before six months from date, the said Brandow shall be at liberty to commence proceedings for the foreclosure hereof, and for enforcing payment of the same against said mine, it being expressly understood that the said Brandow shall have recourse only against said

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mine in the event payment of said sum of fifteen thousand dollars is not made within the six months aforesaid."

This was accompanied by a deed from respondent to appellant, the description in which recites the granted property as "the First Northern Extension of Pocotillo, and being the same mine located on the twenty-eighth day of December, A. D. 1868, by J. S. Reece, H. W. Dunham, J. T. Quigley, W. J. Quigley and P. Fitzpatrick, and by them recorded on the same day in the mining records of said White Pine District, in Book E, page 229."

This somewhat voluminous statement of fact and recital of evidence has been made, as it really comprises the whole case, and is of itself so nearly decisive that very little more need be said. Default occurring in the payment specified in the agreement, respondent filed his bill and claimed a foreclosure upon eighteen hundred feet of mining ground, one thousand north and eight hundred south, alleging that such was the Pocotillo mine. The answer denied, and averred that the mine referred to in the agreement was only the one thousand feet north; making, as will be seen, no controversy about the most northern two hundred feet.

It would seem that the position of the answer was so self-evident that there could be no room for doubt. But respondent was admitted to testify, and swore that the Pocotillo mine "embraces eight hundred feet south of the Belmont monument (that referred to in the notice first recited) and one thousand feet north of the same monument. The defendant is in possession of all the said ground, and has been ever since about the fifteenth day of May, 1869. The Pocotillo Company has done work on the mine; a portion of the work was done at the monument, and some work was done both north and south of the monument. The eight hundred feet and the one thousand feet comprise what is known as the Pocotillo mine."

Upon what theory this testimony was offered, or under what rule of evidence received, is difficult to imagine, and as difficult to perceive what possible bearing it has upon the case. If taken at all its possible weight, it is entirely in the present; and if so understood, of course could not affect the fact or intent of the parties at the date of the agreement. If it is to be construed as referring

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back to the date of the papers, then it simply proves an absurdity; for if appellant was at that time claiming the eight hundred feet south, it had no controversy with respondent. If it was claiming the eight hundred feet north, as in fact it was, then it had at that time no pretence of right to the southern ground, no business upon it, no authority to work it.

But upon the evidence no real conflict arises. The facts are plain, simple, coherent. The parties were disputing about the northern eight hundred feet; both claimed it; the agreement says that it was known as the Pocotillo mine, and about that ground and no other they litigated, compromised, agreed and conveyed. It is a legal impossibility that any other could have been intended, as there was none other in dispute—none other about which any agreement was necessary, or could have been sensibly framed upon the basis set forth in the instrument quoted. The matter is too clear for argument.

Let the decree of the District Court be modified, as claimed by appellant, so as to include the north one thousand feet of what is now known as the Pocotillo mine, and no more.

THE STATE OF NEVADA, RESPONDENT, v. T. B. STEWART, APPELLANT.

UNDER INDICTMENT FOR GRAND LARCENY, PRINCIPAL OR ACCESSORY CAN BE LEGALLY CONVICTED. In a prosecution for grand larceny, where there is no evidence tending to prove guilt, either as principal or accessory before the fact, there can be no legal conviction.

APPEAL from the District Court of the Eighth Judicial District, White Pine County.

Defendant, together with A. Strauss, P. Duffy and others, was indicted for grand larceny for alleged stealing of certain cattle, the property of W. C. Reeves and R. W. Burmington. On a separate trial and conviction, defendant was sentenced to imprisonment in the State prison for the term of five years.

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It appears from the testimony that five head of cattle were stolen from Reeves and Burmington on February 4th, 1870, in the neighborhood of Hamilton, White Pine County; that on Sunday morning, February 6th, 1870, Strauss called on defendant about daylight, and directed him to get Duffy and go down to his slaughter pen, about a mile below Shermantown, and slaughter three head of cattle; that they were in the habit of slaughtering cattle for Strauss, who had a butcher shop in Shermantown; and that they accordingly slaughtered the cattle, which proved to be three of the cattle stolen.

There was no evidence showing any connection of defendant with the taking of the cattle, or any knowledge of them prior to the slaughtering; but it appears that the heads were burned, and the hides and tails concealed after the slaughtering; and it was charged that the defendant was connected with such burning and concealment.

Garber & Thornton, for Appellant.

I. To convict upon circumstantial evidence alone, the circumstances proved must all concur to show that the defendant committed the crime, and must all be inconsistent with any other rational conclusion, and must exclude to a moral certainty every other hypothesis but the single one of guilt. (*People v. Dick*, 32 Cal. 213.) In this case there were no circumstances to show that defendant committed the crime, or any crime.

II. Defendant was indicted as a principal. Even admitting for the sake of the argument that he concealed the hides and tails with knowledge of the stealing, he became thereby only an accessory after the fact, and would have had to be so indicted and sentenced.

Robert M. Clarke, Attorney General, for Respondent.

Appellant's point, as to insufficiency of the evidence to support the verdict, is not well taken for two reasons: first, because the Supreme Court has no jurisdiction of fact in a criminal cause (Constitution, Art. VI, Sec. 4); second, there being *some* evidence in the record to support it, the verdict will not be disturbed.

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The proof being clear that the property was stolen by some one, and the possession being immediately traced to and found in the defendant, the evidence is *prima facie* sufficient to establish the defendant's guilt; and it rests upon the defendant to account for and explain the possession and thus rebut the presumption. (*State v. Weston*, 9 Conn. 527; *State v. Brewster*, 7 Vermont, 118; 2 Bishop Criminal Procedure, Sec. 698.)

By the Court, WHITMAN, J.:

In this case, wherein the appellant was convicted of the crime of grand larceny, there was no evidence proving, or tending to prove his guilt, as principal or accessory before the fact; hence he was illegally convicted.

The motion made for a new trial should have been granted, and was erroneously refused. That order and the judgment are reversed and the cause remanded.

BROWN & EAGAR, APPELLANTS, v. H. C. LILLIE, RESPONDENT.

JUDGMENT FOR DEFENDANT "NON OBSTANTE VEREDICTO," ERROR. When there was a verdict for plaintiff, and defendant moved for judgment *non obstante veredicto* and obtained it: *Held*, that such a motion, if allowable at all under the Practice Act, was only a motion for plaintiff, and that the action of the Court was erroneous.

MOTION FOR JUDGMENT "NON OBSTANTE VEREDICTO." A motion for judgment *non obstante veredicto*, if proper at all under the Practice Act, can certainly not be made by defendant.

NO LEGAL JUDGMENT ON VERDICT IRRESPONSIVE TO PLEADINGS. If a verdict is absolutely defective under the pleadings, no legal judgment can be entered thereon.

APPEAL from the District Court of the First Judicial District, Storey County.

This was an action by E. D. Brown and Thomas Eagar, partners doing business under the firm name and style of Brown & Eagar, for an injunction to restrain H. C. Lillie, the defendant, from sell-

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ing, transferring, delivering, or otherwise disposing of three certain promissory notes for one thousand dollars each, and to compel him to transfer and deliver them to plaintiffs. It was alleged that the notes were originally received by Lewis Lillie, brother of defendant, as the agent of the plaintiffs, and for their use and in payment of their property sold by him. It was further alleged that Lewis fraudulently took the notes in his own name, and that defendant fraudulently received them from Lewis without consideration, and with intent to defraud plaintiffs.

Defendant in his answer denied the charges of fraud, and set up that he had received the notes for a valuable consideration before they were due, and without any notice of any claim of plaintiffs upon them; and that previous to the commencement of suit, he had already sold and transferred them for value.

The verdict was as follows: "We, the jury in the above entitled cause, find for the plaintiffs in the sum of twenty-five hundred and thirty-five dollars, the value of the property as described in the complaint."

The judgment proceeded thus: "In this cause, the jury who tried the same having found a verdict for plaintiffs, on which judgment was deferred by the Court for the purposes of defendant's motion for judgment for defendant *non obstante veredicto*; said motion being made, argued, submitted to and taken under advisement by the Court on the twelfth day of May, 1870: Now, on this, the fourteenth day of May, 1870, the Court having fully considered the same, grants said motion: Whereupon it is ordered, adjudged and decreed by the Court that plaintiffs herein take nothing by this their action; but that defendant, H. C. Lillie, have and recover of and from plaintiffs, E. D. Brown and Thomas Eagar, (Brown & Eagar) his costs in this action expended, taxed in the sum of twenty-six dollars and sixty cents (\$26.60) in the gold coin of the United States."

Hillyer, Wood & Deal, for Appellants.

I. The verdict of the jury is conclusive upon the questions of fact. (*Duff v. Fisher*, 15 Cal. 380; *State v. Yellow Jacket S. M. Co.*, 5 Nev. 417.)

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II. The action of the Court below, in setting aside the verdict, and entering judgment in favor of respondent, cannot be justified. It is true, plaintiffs asked an injunction restraining defendant from selling or disposing of the notes; but the object of the action was to recover the notes; the judgment asked by plaintiffs was that "defendant transfer and deliver the notes to plaintiffs." The verdict was in accordance with section one hundred and seventy-nine of the Practice Act, and judgment should have been entered in accordance with section two hundred and two.

III. There being an answer in the case, the prayer for relief is immaterial, and the only question is whether a judgment should have been entered in accordance with the verdict. (*Marquat v. Marquat*, 2 Kernan, 337; *The People v. Supervisors of San Francisco*, 27 Cal. 684.)

The notes having been shown to belong to Brown & Eagar, and defendant having converted them to his own use, there is no reason why judgment should not have been entered in accordance with the verdict.

Mitchell & Stone, for Respondent.

I. The action was an equitable action brought to obtain equitable relief alone. The only object in calling a jury was that it should render a verdict in the cause advisory merely to the Court. The verdict was not, and is not binding upon the Court, or conclusive upon questions of fact. (*Still v. Saunders*, 8 Cal. 287; *Goode v. Smith*, 13 Cal. 84; *Gray v. Eaton*, 5 Cal. 448; *Van Fleet v. Olin*, 4 Nev. 98.)

II. The *bona fide* holder of a negotiable note by indorsement before maturity takes it subject to no equities existing between his assignor and a third party, which are not indicated on the face of the note. (*Parsons on Cont.*, 213, and cases there cited; *Palmer v. Goodwin et al.*, 5 Cal. 459.)

III. Where, as in this case, the only relief sought was an injunction, the action must have been an equitable one. In such case the verdict was merely advisory to the Court, and it was no error to

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disregard it. The Court below took this view of the nature of the action, and rendered its judgment accordingly.

IV. In an equitable suit this Court will examine the entire case presented in the record, in order to do justice between the parties. In such cases this Court on appeal has full power and jurisdiction for the purpose of equity to correct the errors of the Court below, in whatever shape or by whatever party the appeal is taken up. (*Grayson v. Guild*, 4 Cal. 122.)

V. There was no error in rendering judgment in favor of defendant, for the reason that at the time the action was commenced, the promissory notes in controversy were in the possession of, and the property of, a third party, who had acquired the title thereto prior to the commencement of this suit. An injunction cannot be granted to restrain the performance of an act already past. The Court should dismiss the action. (*Webster v. Fish*, 5 Nev. 192; *Sherman v. Clarke*, 4 Nev. 138; 1 *Waterman's Eden on Injunctions*, 1 and 2; *Hilliard on Injunctions*, 3, Sec. 5.)

By the Court, WHITMAN, J. :

In this case appellants, plaintiffs in the District Court, had a verdict; but before entry of judgment, respondent moved for judgment *non obstante veredicto*, and had it. Whether this motion is proper under the code of this State, need not here be discussed, but under any practice it is a motion for the plaintiff. (*Smith v. Smith*, 4 Wend. 468; *Schermerhorn v. Schermerhorn*, 5 Wend. 514; *Burrill Law Dic.*, Title *Non obstante veredicto*; *Bouvier, id.*) This action of the Court was error, for which its judgment must be reversed. So ordered, and the cause remanded.

For the purpose of saving trouble and expense to the parties herein, it may not be amiss to say that the verdict is so absolutely defective under the pleadings, that no legal judgment can be entered thereon. (*Lambert v. McFarland*, 2 Nev. 58; *Carson v. Applegarth*, ante.)

State of Nevada v. Cleavland.

STATE OF NEVADA, RESPONDENT, v. V. W. CLEAVLAND,
APPELLANT.

FORGERY OF CHECK PAYABLE TO "SAPPHIRE MILL OR BEARER." In a prosecution for forging a check drawn in favor of "Sapphire Mill or Bearer": *Held*, that an objection that the check presented no sensible payee was invalid, for the reason that the check being payable to bearer was sufficient.

FORGERY OF CHECK ON "AGENCY OF BANK OF CALIFORNIA." In a prosecution for forging a check drawn on the "Agency of the Bank of California," where it was both alleged and proved that the bank was a corporation under the laws of California, and that it had an agency in Virginia City, whose business it was to receive deposits and pay out money on the checks of depositors: *Held*, that an objection that the check presented no sensible drawee was invalid.

FORGERY—PROOF OF EXISTENCE OF CORPORATION INJURED. In a prosecution for forging a check upon an "Agency of the Bank of California": *Held*, that the facts of the existence of the corporation and of the agency might be made by oral testimony, and that the production of the certificate of incorporation was unnecessary.

ERRONEOUS ALLEGATION OF PERSON INJURED. An instruction in a forgery case, that "when an offense involves the commission, or an attempt to commit private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, shall not be deemed material": *Held*, to be simply a recital of the statutory provisions upon the subject, (Stats. 1861, 460, Sec. 240) and proper under circumstances calling for an instruction upon the point.

FORGERY OF BANK CHECK—INTENT TO DEFAUD PRETENDED DRAWER. Where an indictment for forgery of a check on a bank alleged an intent to defraud the drawer: *Held*, that though in one sense such drawer could not be defrauded, as he could not be held to pay forged paper, yet, as he might have paid, had the forgery not been discovered, and as the forger could not have intended a discovery, there was an existent possibility of fraud upon him, and that was sufficient.

ALLEGATIONS AND PROOF AS TO PERSONS INJURED BY FORGERY. In cases of forgery there are generally two persons who legally may be defrauded—the one whose name is forged and the one to whom the forged instrument is to be passed, and the indictment may lay the intent to defraud either of them; and proof of an intent to defraud either and to pass the instrument as good, though there be shown no actual intent to defraud the particular person, will sustain the allegation.

APPEAL from the District Court of the First Judicial District, Storey County.

It appears that defendant at the time the check was drawn was in the employ of W. S. Hobart, and had authority to fill up the

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body of checks, but not to sign them. The check in question was one of a number said to be forged, and others of them were introduced in evidence to show guilty knowledge. Defendant was sentenced to imprisonment and hard labor in the State prison for the term of two years.

Mitchell & Stone, for Appellant.

I. "If the drawer's, drawee's or payee's name be wanting or be insensible * * * the instrument will not sustain the technical description." (Wharton's American Law, 4th ed., 344, and cases cited; 2 Bishop on Criminal Law, 4th ed., Sec. 526.) The drawee, "Agency of the Bank of California," and the payee, "Sapphire Mill," have not an existence, unless as artificial persons; and if artificial persons, they should be so alleged in the indictment, to give validity to the instrument.

II. There is no averment of the existence of the "Agency of the Bank of California," as a corporation, association, artificial person, or anything having an existence either in fact or in law. The averment is simply that the bank has an existence as an incorporation under the laws of California; and that it has a branch office at Virginia, known as the Agency of the Bank of California.

There being then no drawee, properly averred or proved, the check had no validity, and the defendant was erroneously convicted. (*People v. De Bow*, 1 Denio, 1.)

III. Oral testimony was not competent to prove the existence of the Agency of the Bank of California; such an agency could only be created by an act of the board of trustees, and the books thereof were the best evidence. (Angell & Ames on Corporations, Sec. 283; *Owing v. Speed*, 5 Wheat. 424; *Thayer v. Middlesex Ins. Co.*, 10 Pick. 326; *Narragansett Bank v. Atlantic Silk Co.*, 3 Met. 282; 15 Wend. 256; 13 N. H. 532; 12 Shep. 532.)

IV. The indictment charges the intent to defraud W. S. Hobart. This intent must be proved as laid; and if, as in this case, Hobart could not be defrauded by the writing, defendant should have been acquitted. 2 Bishop on Criminal Law, 510; Whar. P. & P., 136; 1 Sharkie C. P., 122-200; 3 Chitty C. L., 1042.)

State of Nevada v. Cleveland.

Robert M. Clarke, Attorney General, for Respondent.

I. The Bank of California, incorporated under the laws of the State of California, may lawfully do business through an "agency" in the State of Nevada. (Angell & Ames on Corporations, Sec. 104.)

II. The existence of the agency is formally and sufficiently pleaded in the indictment.

III. The Court did not err in admitting oral proof of the existence of the "Agency of the Bank of California." (2 Wharton's A. C. L., Sec. 1429; *People v. Hughes*, 29 Cal. 257; Stats. Nev. 1861, 73, Sec. 85; 15 Ohio R., 217; 1 Parker, 469; 21 Wend. 309.)

IV. A bare possibility of fraud is sufficient to warrant conviction in forgery. (2 Wharton A. C. L., Secs. 1439, 1493, 1498; Ohio Crim. Law and Forms, 256.)

V. It is sufficient and proper to allege and prove "intent to defraud" the person whose name is forged to the check. (2 Bishop C. P., Secs. 376, 377; 2 Bishop, C. L., Secs. 510-556.)

By the Court, WHITMAN, J.:

Appellant stands convicted of the crime of forgery, and objects to the judgment: First, that "the indictment does not state facts sufficient to constitute the offense charged." Second, that "the instrument set out in the indictment as forged is not a legal check as shown by the indictment." Third, that "the Court erred in permitting oral testimony to prove the existence of the Agency of the Bank of California." Fourth, that "the Court erred in instructing the jury, where an offense involves the commission, or an attempt to commit private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, shall not be deemed material." In argument, counsel for appellant consider the first two objections together, and as that seems the more natural and convenient course, their example will here be followed.

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The indictment charges forgery by defendant of a check in words and figures following, with intent to injure one W. S. Hobart:

“ VIRGINIA, NEV., May 25th, 1868.

“ Agency of the Bank of California.

Pay to Sapphire Mill, or bearer, one hundred and twenty dollars.
\$120.00.

W. S. HOBART,
per N. C. Hall.”

As extrinsic matter, it is averred that the Bank of California is a corporation under the laws of the State of California, having a branch office in Virginia City, State of Nevada, the business of which was to receive deposits and pay out money on checks of depositors, or their authorized agents. That Hobart, at the date of the check *aforecited*, had credit at such agency; that Hall was his authorized agent to draw checks thereon.

Counsel for appellant object that the check as recited presents no sensible payee or drawee; and that the extrinsic matter averred is not sufficient to avoid the objection. Is that so? So far as the payee is concerned, the check is payable to bearer, which is sufficient. It is alleged that the drawee is engaged in the business of receiving money and paying the same on depositors' checks, as a branch of a California corporation; this it might lawfully do.

The principal portion of the business of this State is thus conducted by agents for foreign corporations, and the authority cited by counsel recognizes the right in explicit terms as by them quoted, thus: “ A corporation duly organized, and acting within the limits of the State granting the charter, may, by vote transmitted elsewhere, *or* by agent duly constituted, act and contract beyond the limits of the State.” (Angell & Ames on Corporations, Sec. 104.) It is argued, however, that such action must be subservient and incident to the business of the corporation where chartered, otherwise it is unauthorized and illegal.

Whether so or not, is no matter of enquiry here. The fact of existence for the purposes averred in the indictment is sufficient to constitute a proper drawee.

Upon the trial, the existence of the corporation was proved by proffer of its certificate of incorporation, the existence of the agency

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by the oral testimony of Mr. Martin, who testified "that it was an agency of the corporation, receiving deposits and paying out money on checks drawn, with Wm. Sharon as agent." It was unnecessary to have offered the certificate of incorporation. Such is the general current of decisions, for the question is not the legality of the corporation, but of the guilt or innocence of the defendant, to which the corporation is no party, but is simply collaterally introduced; and if the fact of existence be proved, it matters not whether it be such as would give it a standing in Court, were it there in its own behalf. (*People v. Hughes*, 29 Cal. 258.) So with the agency, it is not necessary to prove more with regard to it than with regard to its principal. That there was such an existence pursuing the business averred, was enough for the purpose of the prosecution.

The instruction complained of is simply a recital of a section of the statute regulating criminal proceedings, (Stats. 1861, 460, Sec. 240) and was properly given in connection with other matter to warn the jury against the seemingly plausible argument of counsel for defendant, that as Hobart, the person whom the indictment alleged the defendant intended to defraud, could not legally be defrauded, therefore there could be no such intent.

Though in one sense Hobart could not be defrauded, as he could not be held to pay forged paper; yet, on the other hand, he might have been defrauded, as he might have paid had not the forgery been discovered and proven; and so the presumption arises that the forger intended thus to defraud, as it cannot be supposed that he would commit the forgery intending or expecting that it would be discovered: there was then the existent possibility of fraud, which is all that the law demands. And again, the rule is as was substantially stated by the District Court: "Generally there are two persons who legally may be defrauded; the one whose name is forged, and the one to whom the forged instrument is to be passed; and so the indictment may lay the intent to defraud either of these, and proof of an intent to defraud either of these, and proof of an actual intent to pass as good, though there be shown no actual intent to defraud the particular person, will sustain the allegation." (2 Bishop's Crim. Law, Sec. 556.)

The indictment then being sufficient, and no error occurring at the trial, the judgment of the District Court is affirmed.

The State of Nevada v. The Eberhart Company.

THE STATE OF NEVADA, APPELLANT, v. THE EBERHART COMPANY, RESPONDENT.

APPEAL—TRANSCRIPT CONTAINING NOTHING TO BE REVIEWED. Where, on appeal from a judgment and order overruling a motion for a new trial, the transcript contained neither judgment, order, settled or agreed statement, nor bill of exceptions: *Held*, that there was nothing before the Appellate Court which could be reviewed.

PRACTICE.—DISMISSAL OF APPEAL. Where there is a failure to bring up in the record anything to be reviewed, the appeal will be dismissed.

APPEAL from the District Court of the Sixth Judicial District, Lander County.

This was an action brought in the name of the State by the district attorney of Lander County, against the Eberhart Company, F. Drake, E. Applegarth, — Sprowl, — Barris, J. W. Crawford, and the Eberhart mine and ledge, to recover one thousand eight hundred and forty-five dollars and fifty-eight cents, a balance of taxes on the proceeds of the Eberhart mine for the last quarter of 1868. The entire tax for the quarter was seven thousand one hundred and thirty-six dollars and twenty-four cents, of which five thousand two hundred and ninety dollars and sixty-six cents had been paid. The defendants set up in their answer certain proceedings of the board of county commissioners, acting under the Act of April 2d, 1867, (Stats. 1867, 164) and releasing the amount of taxes claimed. The court below decided in favor of defendant, and overruled a motion for new trial.

The transcript contained what purported by its caption to be "A statement on motion for new trial to be used also on appeal," embracing complaint, answer, exhibits, findings, motion for new trial and grounds of motion; but no certificate of agreement by attorneys, or settlement by the Judge. The only other matters contained in the transcript were a notice of appeal, and certificate of clerk that the record was a correct and true copy of the original matter thereof remaining in his office, at Austin.

Robert M. Clarke, Attorney General, for Appellant, attacked the constitutionality of the Act of April 2d, 1867, on the ground

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that it did not provide a uniform and equal rate of assessment and taxation, (citing 3 Nev. 173; 4 Nev. 178; 34 Cal. 434; 9 Wis. 414; 11 Wis. 34) and on the ground that it was a special law for the assessment and collection of taxes for county purposes, (citing 5 Nev. 121; 10 Wis. 180; 5 Ind. 4; Smith's Com., Sec. 802; 20 Cal. 534; 2 Minn. 295; 2 Kent's Com. 331; Blackwell on Tax Titles, 6).

Aldrich & Wren, for Respondent, maintained the constitutionality of the Act of 1867, and called attention to the fact that the transcript did not contain the judgment.

By the Court, LEWIS, C. J.:

This appeal purports to be from a judgment, and also from an order overruling a motion for new trial, neither of which, however, appears in the record; nor does the transcript contain any settled or agreed statement either on motion for new trial or on appeal, nor any bill of exceptions; hence there is nothing before us which can be reviewed.

This failure to bring up the case as the Practice Act plainly requires, deprives the county of a hearing on the merits, and makes it incumbent on this Court to dismiss the appeal.

It is so ordered.

R. H. CARSON, RESPONDENT, v. CLARKSON APPLE-
GARTH *et als.*, APPELLANTS.

REQUISITES OF VERDICT IN REPLEVIN. Where, in replevin, it appeared that a portion of the property had been delivered to plaintiff, and defendant claimed a return, and there was a general verdict for plaintiff in a sum certain: *Held* that the verdict was erroneous, for the reason that no such peculiar judgment or execution as are provided for by statute in such cases could be rendered or issued thereon.

REPLEVIN VERDICTS, JUDGMENTS AND EXECUTIONS. In a replevin case, where the property has not been delivered to plaintiff, a verdict and judgment in his favor are required by the statute, (Practice Act, Secs. 179 and 202) to be in the alternative, and so also is the execution.

Carson v. Applegarth.

REPLEVIN—OPTION TO TAKE PROPERTY OR VALUE. In a replevin suit, where the verdict is for plaintiff, and he has not already received the property, defendant has a right to deliver it instead of money, and in such case the option to take the property or its value does not rest with plaintiff.

APPEAL from the District Court of the Eighth Judicial District, White Pine County.

The plaintiff commenced his replevin suit against Clarkson Applegarth, S. L. Baker, Robert Kelly, Thomas Luther, Frank Drake and others, to recover certain ore taken from the "Ohio State Claim," on Bromide Flat, in White Pine County. The amount taken was alleged to be forty-two tons and upwards, of which twenty-six tons and upwards had been crushed and washed at the Eberhart Quartz Mill. The remaining sixteen tons being in the hands of defendants, were seized by the sheriff and delivered to plaintiff.

• *Aldrich & Wren*, for Appellants.

I. The verdict is not in accordance with the requirements of the statute in cases of this kind. It should have been for the possession of the property, or its value, or damages for detention. (Practice Act, Secs. 179 and 202.)

II. The verdict is not responsive to the issues in the case, and is too uncertain to render a judgment upon, such as would be proper; and this especially so when it is considered that part of the property had been delivered to respondent, and was at time of the trial in his possession.

Tilford & Foster, for Respondent.

By the Court, WHITMAN, J.:

Respondent brought his action to recover certain specific personal property. Of that property a portion had been delivered to him, a portion not. Appellants claimed a return. The following verdict was rendered: "We, the jury in the above entitled cause, find for plaintiff in the sum of three hundred and one dollars." Upon this verdict, judgment was rendered for the amount found, and costs.

Carson v. Applegarth.

Appellants first object that the verdict and judgment are not in accordance with the statute regulating the practice in such cases, referring particularly to sections one hundred and seventy-nine and two hundred and two of the Practice Act as follows :

SEC. 179. "In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant by his answer claim a return thereof, the jury, if their verdict be in favor of the plaintiff, or if, being in favor of the defendant, they also find that he is entitled to a return thereof, shall find the value of the property." * * * *

SEC. 202. "In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had." * * * *

The statute further provides the peculiar execution which shall follow ; so there appears intended by the provision referred to, first, the verdict—the basis ; next, the judgment ; next, the execution ; all in the alternative in cases similar to the present.

Upon the verdict in the case, no proper judgment could be rendered, and upon the judgment no statutory execution could issue. To the defendant in an action of this kind, against whom a verdict is found, always belongs the right if the property has not been delivered to deliver it himself ; and in such case it is not at plaintiff's option to take the property or its value. If he cannot get the property, then he may claim its value, but not otherwise.

The objection taken is decisive of the case. The jury should have rendered an alternative verdict as to the property not returned. This is a point upon which there is no conflict of authority. (*Lambert v. McFarland*, 2 Nev. 58 ; *Fitzhugh v. Wiman*, 9 N. Y. [5 Seld.] 559 ; *Ford v. Ford*, 3 Wis. 401 ; *Wallace v. Hilliard*, 7 Wis. 628.)

The judgment of the District Court and its order refusing a new trial are reversed, and the cause remanded.

Conway v. Edwards.

KERN J. CONWAY, APPELLANT, v. W. S. EDWARDS *et al.*,
RESPONDENTS.

SALE—EVIDENCE OF CONTINUED CHANGE OF POSSESSION. In an action against an officer to recover personal property seized by him on execution against a third person, from whom plaintiff claimed to have purchased and received possession of it previous to the seizure, and in which the question of continued change of possession became involved: *Held*, that it was competent for the plaintiff to show his acts of ownership after the sale, and that any exclusion of such testimony was error.

STATUTE OF FRAUDS—PROOF OF SALE. To show a continued change of possession, such as is necessary to support a sale of personal property under the Statute of Frauds, nothing generally can have a more direct tendency than the control and management of the property, or acts of ownership exercised over it by the vendee.

LEASE OF PREMISES AS EVIDENCE OF SALE OF GOODS. Where it became an issue whether certain unbaled hay, which had been sold, had passed to the continued possession of the vendee as claimed by him: *Held*, that a lease by the vendor to the vendee of the premises in which the hay was kept was competent and material testimony for the vendee, and that it was error to prevent him from introducing it.

APPEAL from the District Court of the Third Judicial District, Washoe County.

This was an action of replevin brought against W. S. Edwards and C. A. Comstock, constable and deputy constable of Reno Township, Washoe County, to recover the property referred to in the opinion, alleged to be of the value of two thousand six hundred and forty dollars. It appears that this property, which was at the time on what was known as the "Boynton Ranch" at the Truckee Meadows, in Glendale Township, Washoe County, was seized on November 10th, 1869, by the defendants under process in certain suits commenced by Black & Bros. and John Larcomb against J. W. Boynton, before a justice of the peace of Reno Township, there then being no justice in Glendale Township. Plaintiff claimed to have purchased the property of Boynton on August 4th, 1869, and to have held continued possession of it since that time. The lease referred to in the opinion was of the Boynton Ranch, executed by Boynton to plaintiff on September 1st, 1869, for the term of one year from date of execution.

Mitchell & Stone, for Appellant.

I. The Court erred in excluding the testimony of J. Gantz for the purpose of proving acts of ownership by plaintiff over the property in dispute after the sale.

II. The Court erred in excluding the lease offered. (*Sharon v. Shaw*, 2 Nev. 289.)

Haydon & McElvaney, for Respondents.

I. In a contest between an attaching creditor and one who is claimed to be a fraudulent vendee, the latter cannot make evidence for himself by proving his own acts and declarations. When he proves a bill of sale, that is full evidence of his *ownership* as between him and his *vendor*, and the *best* evidence. The facts that he may have paid toll on the team; sold some hogs not attached, but included in his bill of sale; sold some hay not attached, and bought some supplies, were facts in no wise proving an immediate delivery, nor an actual and continued change of possession.

II. The only relevancy the lease could have had was to prove a change of possession of Boynton's ranch, and thus prove a change of the possession of the property described in the bill of sale, which was partly kept on the land all the time, and part of which was kept there only when not otherwise employed; but the lease being given September 1st, 1869, was not evidence of an *immediate* delivery on August 4th, when the sale took place, and was not evidence of a continuous and actual change of possession after the sale, when unaccompanied with evidence that plaintiff had possession during the interim between August 4th and September 1st; nor was it evidence of an actual and continued change of possession after September 1st, as it appears by the evidence that Boynton, after September 1st, continued to reside on the ranch just as he had done before the execution of such lease. An equivocal possession of this kind does not satisfy the statute of frauds. (*Lawrence v. Burnham*, 4 Nev. 367.)

By the Court, LEWIS, C. J.:

Upon execution issued by a justice of the peace against the

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property of one Boynton, the defendant Edwards, who was the officer of the Court issuing the writ, seized certain property consisting of cattle, horses, wagons and hay, which plaintiff claims was purchased by him from Boynton about one month previous to its seizure by Edwards, and consequently that it belonged to him and not to Boynton at the time of the levy; and thus is raised the question whether the sale by Boynton to the plaintiff was consummated or perfected by an immediate delivery and continued change of possession of the chattels in question, in accordance with section sixty-five of the statute of frauds.

That a sale had been made by Boynton to Conway seems not to have been questioned, but the defendants endeavored to show that no immediate and continued change of possession of the property had taken place. To this question all, or nearly all, of the testimony appears to have been directed at the trial; anything, therefore, tending to establish such change of possession was important to the plaintiff. But we find in the record the statement that he offered to prove by the witness Gantz certain acts of ownership performed by the plaintiff respecting the property after the sale. The defendant objected to the testimony thus offered, and the objection was sustained. To this ruling exception was taken, and it is here assigned for error. Upon what ground the evidence so offered was ruled out, does not appear. Other testimony of a similar character was admitted, and properly so, if it in any wise tended to show a change of possession. Nothing generally can have a more direct tendency to show a change of possession than the control and management of the property, or acts of ownership exercised by the vendee over it. It is often the only mode whereby the change can be shown to be continuous. Surely, if in this case an immediate delivery had been made, (and whether there had or not, was a question upon the evidence in the case for the jury to determine) no better evidence of the continuance of that change could be adduced than proof that the plaintiff assumed the management and control of the property after the sale; at least, such evidence would tend to prove a continued change of the possession, and that was sufficient to entitle the plaintiff to its introduction, if there were no special objection to it, which does not appear to have been the case here.

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The evidence, it is true, may have had no tendency whatever to establish an immediate delivery of the property ; but that it tended to prove a continuance of the change of possession can hardly admit of doubt. Whether the delivery immediately followed the sale, depended upon and may have been established by other facts to the satisfaction of the jury, and they may have been satisfied from the evidence that such delivery had taken place, and thus all testimony tending to make out a continued change of the possession would be important to the plaintiff ; so, for the same purpose, the lease of the premises upon which the property in question was kept may have been important to this case. Suppose, for example, the hay could not be removed from the premises until baled, and the plaintiff proceeded with reasonable expedition to bale and remove it, which he would be required to do ; doubtless that would be held a delivery of the hay, although from its nature and condition considerable time would be taken to fully accomplish it. If after such delivery, and before its removal, the vendor leased the premises to the vendee, certainly it would not then be necessary to make any further removal of the property. The change of possession of the personal property would follow the change in the real estate upon which it was located. If then the jury were able to find an immediate delivery of any of the property in this case, the lease may have been important to show the continued change of the possession ; for if no lease were made, they may very well have found that the change of possession was not continuous, although there had been an immediate delivery.

The Court erred in ruling out the evidence of the witness Gantz, as well as the lease offered by the plaintiff ; hence, the judgment must be reversed and a new trial granted.

Corbett v. Swift.

DANIEL G. CORBETT, RESPONDENT, v. S. T. SWIFT, APPELLANT.

MOTION FOR NEW TRIAL—WAIVER OF NOTICE OF DECISION. Though a party in cases tried by the Court is not required to move for a new trial until "ten days after receiving written notice of the rendering of the decision of the Judge," yet if he proceed in the case upon actual knowledge of such decision, he waives his right to written notice.

TIME TO MOVE FOR NEW TRIAL—PRACTICE ACT, SEC. 197. Under section one hundred and ninety-seven of the Practice Act, a party in a case tried by the Court has "ten days after receiving written notice of the rendering of the decision of the Judge" to move for a new trial, and as long as he does not act, waiving his right, no advantage can be taken of the fact that he has had actual knowledge.

WAIVER OF RIGHT TO MOVE FOR A NEW TRIAL. Where a party in a case tried by the Court appealed from a judgment without the preliminary step of moving for a new trial: *Held*, that he thereby waived such motion, and could not afterwards take advantage of the fact that he had received no written notice of the rendering of the decision of the Judge.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

This was an action brought December 17th, 1868, against Moses Job, Margaret Job, (his wife) and S. T. Swift, to foreclose a mortgage for \$2,000 and interest, given in 1864 by Job and wife to plaintiff on certain property in Carson City. It appears that after making the mortgage, and before suit brought, Job and wife made a deed of the same property to Swift, who was the only person that answered. Judgment having been rendered against him, he appealed to the Supreme Court, and at the July term, 1869, the judgment of the Court below was affirmed. (5 Nev. 201.) He then proceeded in the Court below to move for a new trial, as stated in the opinion.

T. W. W. Davies, for Appellant.

It has been held in California, under a statute identical with ours, that after an appeal from a judgment alone, a party may appeal from an order overruling a motion for new trial in the same case, provided the latter appeal is taken in time; and this, too, in a case where the order had been made overruling the motion for new trial prior to the appeal from the judgment. Much more than

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could the latter appeal be taken in the case at bar, for the reason that the order overruling the motion for new trial was not made until the appeal from the judgment had been taken and disposed of in this Court.

Clarke & Wells, for Respondent.

By the Court, WHITMAN, J. :

This appeal is another phase of the case decided, in 5 Nev. 201, under the title of *Corbett v. Job et al.*

After that decision, appellant gave notice of intention to move for a new trial, and within due time thereafter prepared and filed his statement. The District Judge denied the motion upon the ground that it came too late. Appellant insisted that as the case was one where the Court had rendered a decision, he might make his motion under the statute "within ten days after receiving written notice of the rendering of the decision of the Judge," (Stats. 1869, 226, Sec. 197) and that, as matter of fact, no such notice had been legally served; the service having been made upon appellant personally, instead of upon his attorney. The Court held that the suggestion of fact was correct, but that appellant had waived his right to require notice by accepting and acting upon his actual knowledge as evidenced by his appeal, and had waived his right to move for a new trial by allowing the time therefor to lapse.

There would seem to be little doubt of the correctness of this decision. Had the appellant taken no action, no advantage could have been taken of his actual knowledge; but he appealed from the whole judgment, recognizing it in its entirety, asking of this Court its vacation without the preliminary step of motion for new trial. The natural presumption is that such motion was waived.

Had the notice of rendition of judgment in fact been given, and the appeal been taken, it would not be claimed that appellant could make his motion for a new trial at this time. Why any more, when it is apparent that the full object of the notice has been accomplished, and he has suffered no wrong?

It would look like trifling with the practice of the Courts to adopt any other view than that announced by the District Court.

The judgment of that Court is affirmed.

Fitton v. The Inhabitants of Hamilton City:

**JAMES FITTON, RESPONDENT, v. THE INHABITANTS OF
HAMILTON CITY *et als.*, APPELLANTS.**

ENTERING AND HOLDING UNDER LEASE NOT SIGNED BY TENANT. If a person obtain possession and occupy premises under lease, (though not signed by him) he should be holden to accept subject to all the covenants and obligations of the instrument.

ACTION FOR RENT ON LEASE NOT SIGNED BY TENANT. Where a tenant holds premises under a lease not signed by him, although a technical action of covenant might not be supported, an action in the nature of assumpsit for rent can certainly be maintained.

LEASE NOT SIGNED BY TENANT AS EVIDENCE AGAINST HIM. In an action for rent against a tenant, who holds under a lease signed only by the lessor, such lease is admissible in evidence to show the conditions and reservations under which the possession is held.

EFFECT OF HOLDING UNDER LEASE NOT SIGNED BY TENANT. Where a tenant took and held possession of premises under a lease not signed by him: *Held*, that his acceptance of possession was equivalent to an execution of the instrument.

HAMILTON CITY PAROL CONTRACTS. The charter of Hamilton City providing that "all scrip and bonds issued and contracts and agreements made shall be signed by the president and countersigned by the clerk," (Stats. 1863, 165, Sec. 14) does not prohibit parol contracts by the city, but only designates the manner in which written contracts shall be executed.

PAROL AND IMPLIED CONTRACTS BY MUNICIPAL CORPORATIONS. A municipal corporation, in the absence of statute to the contrary, may, like any other corporation, render itself liable on parol or implied contracts.

ENTERING UNDER LEASE WRONGLY DESCRIBING LESSOR—ESTOPPEL. Where the City of Hamilton entered upon and held certain premises under a lease purporting to run to the "Trustees of Hamilton City," but signed only by the lessor: *Held*, that the corporation was estopped from taking advantage of the fact that it was not correctly named in the lease.

LEASE—TERM CREATED BY HOLDING OVER. Where a tenant under a lease for three months held over after the expiration of the term with the consent of the landlord: *Held*, that a new term of three months was created, and that it was no answer to the landlord's claim for rent for such new term, that the tenant did not occupy the premises for the whole of it.

STATUTE RELATING TO TENANTS HOLDING OVER. Where a tenant under a lease for a term less than a year holds over with the consent of his landlord, a new tenancy for a like term is created by virtue of the statute. (Stats. 1864-5, 264.)

APPEAL from the District Court of the Eighth Judicial District, White Pine County.

This action was instituted by James Fitton as trustee of Mary Jane Allen, against "P. C. Hyman, E. T. Estes, Reuben Barney,

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E. H. Sanderson and H. S. Sanders, styling themselves Trustees of Hamilton City, and the Inhabitants of Hamilton City." After the execution of the lease by R. M. Peters, he sold the property leased to Richard N. Allen, who afterwards conveyed it to the plaintiff Fitton, trustee as aforesaid.

Will Campbell, J. O. Darrow and A. M. Hillhouse, for Appellants.

I. The corporation occupied the premises only sixteen days over the time for which rent was paid, and it contends it is liable only for two hundred and fifty dollars, one month's rent.

II. The instrument called a lease was improperly admitted in evidence, because it was not signed by the lessee, Hamilton City. It was no lease. Hamilton City under its charter could not make a lease, except by writing, signed and countersigned as therein provided. Being a creature of statute, it could make no contract except by strictly following the provisions of the law creating it. The contract purports to be made with the "Trustees of Hamilton City," and there being no such persons in existence, either natural or artificial, the instrument is void, and the city cannot be bound by it.

III. It is claimed that the contract was ratified, but we contend there is no evidence of ratification by the board of trustees, and further, that an instrument which is void for want of mutuality or any other cause, cannot be ratified. If it could be ratified, it could only be by an instrument signed as required by the charter, and none such was proven and none such exists.

IV. If there was a lease, it was only binding on the corporation so long as it held the premises. It agreed to pay the "rent as above stated for such further time as the lessees might hold the same," and could not be held for rent longer than it held after the expiration of the term agreed on. The construction to be placed upon the instrument is that which is strongest against the grantor.

V. It is claimed that the statute of 1865 created a new term; but we apprehend, if a contract is made for a term, and the lessee

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covenants that he will pay only for such further time as he may hold the premises, such a construction would be stretching the statute to an unwarrantable extent. (1 Hilliard on Real Property, 212, Sec. 77, and authorities there cited.)

Gehr & O'Dougherty and *A. C. Ellis*, for Respondent.

By the Court, LEWIS, C. J.:

The Judge by whom this action was tried considered the evidence sufficient to warrant the following findings of fact, which embody the essential issues between the parties and sufficiently explain the character of the action.

"The defendants are the individuals composing the board of trustees of the municipal corporation of the 'Inhabitants of Hamilton City,' and that corporation itself.

"The corporation was created and duly organized by and under the act of the Legislature of the State of Nevada, entitled 'An Act to incorporate the town of Hamilton,' approved March 6th, 1869.

"On or about the fourteenth day of April, A.D. 1869, and after the organization of said corporation, its board of trustees adopted a resolution authorizing and directing a committee of their body to take a lease of a certain building situated in Hamilton for a term of three months, with the privilege of six, at a rent not exceeding two hundred and fifty dollars per month, for the use of the city for the purposes of a city jail, etc. This resolution was recorded in the minutes of the proceedings of the board, and duly approved, signed by the president of the board and by its clerk.

"Under this authority, the committee obtained from R. M. Peters, assignor of plaintiff, a lease of the lot upon which said building was situated, for the term of three months from the date of the lease, April 19th, 1869, with the privilege of three months additional from the nineteenth of July, 1869, at a rent of seven hundred and fifty dollars gold coin, the rent to be paid monthly in installments of two hundred and fifty dollars in advance, and also rent as above stated for such further time as the lessees might hold the same.

"This lease was signed only by the lessor, but was accepted by the committee and remained in their possession. Their proceed-

ings were reported to the board, and the city entered into possession of the premises, used them for a city jail, recorder's court and place of meeting for the board.

"After the expiration of the six months subsequent to April 19th, 1869, the corporate authorities continued to occupy said premises with the consent of the plaintiff, who had purchased of Peters, the lessor, until the thirteenth of November, when the building was destroyed by fire.

"The defendants paid the rent of the premises for six months, to wit: fifteen hundred dollars, but have not paid any further sum.

"As conclusions of law from the foregoing facts, the Court finds that the defendants, except the corporation, are not liable to plaintiff in any way, and are entitled to their costs of suit.

"But the corporation, by holding over with the consent of the landlord after the expiration of his term, became a tenant for another term of three months at a rent of seven hundred and fifty dollars gold coin, payable monthly in advance, two hundred and fifty dollars per month; and the plaintiff is entitled to a judgment against said corporation defendant for said sum of seven hundred and fifty dollars gold coin, interest and costs of suit."

The defendants, Hyman, Estes, Barney, Sanderson and Sanders, were adjudged not liable, and therefore entitled to judgment for costs; which judgment was rendered against the corporation for the sum of seven hundred and fifty dollars, the amount of the rent due for the term of three months, beginning on the nineteenth day of October, and ending on the nineteenth day of January. From the judgment against the corporation, and also from the order refusing a new trial, this appeal is taken upon several assignments of error, only two of which, however, it will be necessary to notice, as they involve the entire merits of the controversy; and these are:

1st. The Court erred in admitting in evidence the lease offered by the plaintiff.

4th. It erred in finding as a conclusion of law that the corporation, by holding over after expiration of the six months, with the consent of the landlord, became a tenant for another term of three months at a rent of two hundred and fifty dollars per month.

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In the lease offered in evidence, the "Trustees of Hamilton City" were named as lessees, and it was signed only by Peters, the lessor; hence the objection to its admission in evidence. It is established beyond controversy, that the instrument was executed on behalf and for the benefit of the municipality of Hamilton. It is also established beyond all controversy, as found by the Judge below, that the corporation entered into possession and occupied the premises under the lease thus executed. Upon these facts, the question arises whether the taking possession under the lease rendered the defendant liable upon the covenants as if it had executed the instrument in proper form. If so, the lease was undoubtedly admissible; if not, possibly it should have been rejected.

It is the plainest dictate of justice and right, that if one obtain possession and occupy premises under a lease, he should be holden to accept it subject to all the covenants and obligations of the instrument. The presumption that he does so is surely a fair and natural one, and although it has been held that an action of covenant could only be maintained against one who has executed the deed, still we are not aware of any authority holding that no action whatever could be maintained upon it, and the cases referred to are decisions simply respecting the proper form of action, where, as in this case, the deed is not, in fact, executed by the defendant.

But even upon that point we are inclined to think the decided weight of authority is the other way. (See a very able review of this question in the case of *Finley v. Simpson*, 2 Zabriskie's R., 311.) Under our practice, the different forms of action being abolished, it is only necessary to determine whether an action in any form can be maintained upon such instrument. That it can, scarcely admits of doubt. Many of the authorities which hold that covenant cannot be maintained, concede that any action which is not necessarily based upon specialty can be.

This distinction has its origin, probably, in the fact that an action of covenant was necessarily founded on a specialty—on the seal of the defendant—whilst assumpsit might be brought on an implied promise merely; hence, where there was no execution of the deed by the defendant, the action of covenant had no foundation, whilst the implied assent or acceptance of the deed, by taking possession

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under it, would be sufficient to support assumpsit. Whether this be the true reason or not is of no consequence; that it exists, and that all the Courts admit that an action of assumpsit for rent may be brought upon such instrument, where the defendant has entered into possession under it, is certain.

In *Goodwin et als. v. Gilbert et als.*, 9 Mass., the Court treated the question as settled, saying in its opinion: "The principal question in this case is whether if one grant lands to another by deed poll, with a reservation of certain duties to be performed by the grantee for the benefit of the grantor, this latter may have assumpsit against the grantee upon his non-performance. It has long been settled that an action lies for rent reserved upon a deed poll. The reason of the principle has a general application, and we are all satisfied that as a general rule, where land is conveyed by deed poll and the grantee enters under the deed, certain duties being reserved to be performed, as no action lies against the grantee on the deed, the grantor may maintain assumpsit for non-performance of the duties reserved." If an acceptance of covenants and reservations of a lease is to be presumed from the entry upon and enjoyment of the premises under it by the lessee, or if assumpsit will lie for the non-performance of any duty reserved, surely the instrument under which such possession was taken in which the duties are reserved is admissible in evidence, for the purpose of showing what obligations the lessor assumed by entering into possession under it. Indeed, the case is simply this: a written lease executed by the lessor with an implied acceptance of it by the lessee. Upon such implied acceptance, as upon any implied contract, we see no reason why an action will not lie, nor why the lease whereby the lessor bound himself, and to whose covenants and reservations the lessee gave consent, should not be admissible in evidence for the purpose of establishing the conditions and reservations upon which possession of the premises was taken by the latter. So far as this case is concerned, we hold that the acceptance of possession of the premises by the corporation is equivalent to an execution of the instrument itself in proper form. The lease was not required to be in writing at all: if simply by parol, it would be equally binding on the city.

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The statute (Laws of 1869, 165, Sec. 14) which declares that "all scrip and bonds issued and contracts and agreements made shall be signed by the president and countersigned by the clerk," in no wise prohibits parol contracts by the city, but only designates the manner in which written contracts shall be executed; and in the absence of statute to the contrary, a municipal corporation, like any other, may render itself liable on parol or implied contracts; hence, the Court below ruled correctly in admitting the lease.

Nor can we see how the fact that "the Trustees of Hamilton City" were designated as the lessees can make any difference in this result, for under that name the corporation accepted the lease, entered into possession, and occupied the premises. The lease was in fact procured for the benefit of the corporation, and the instrument upon its face exhibits that fact. Had the trustees executed the lease in their own names, a different question, and perhaps one more difficult, would be raised; but here is an instrument regularly executed only by the lessor, yet the defendant, the Corporation of Hamilton City, accepting it, entering into possession under, and reaping all the advantages from it. Under such circumstances, upon the well-settled principles of estoppel, the corporation will not be permitted to take advantage of the fact that it was not correctly named in the lease. As it assumed that style for the purpose of obtaining privileges under the lease, it will not be allowed to discard it for the purpose of avoiding the obligations and duties imposed by it.

The second assignment of error is very readily disposed of. Sec. 4, page 264, Laws of 1864-5, declares that "in all leases of lands or tenements or any interest therein, for a month, or any less term than one year, and the tenant holds over his term by consent of his landlord, the tenancy shall be construed to be a tenancy from month to month, or a tenancy for such term less than a year as the case may be." We have endeavored to show that the municipality, known as the "Inhabitants of Hamilton City," accepted the lease and thereby bound itself by all its covenants. The term designated in the lease being three months, and the defendant having held over by the consent of the landlord after the expiration of that time, by virtue of the statute above quoted the term was extended for

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another three months, and thus the defendant became liable for the stipulated rent for that additional length of time. That it did not occupy the premises during the entire time is no answer to the plaintiff's claim, unless the landlord by some act of his own relinquished his right, and that is not pretended in this case.

The judgment below must be affirmed. It is so ordered.

ALLEN J. CLARK, RESPONDENT, v. THE NEVADA LAND
AND MINING COMPANY, LIMITED, APPELLANT.

APPEAL IN CASE OF CONFLICT OF EVIDENCE. The rule that a judgment will not be disturbed as being against evidence, where there is a conflict of evidence, has been often enough announced to be considered settled.

PROSPECTIVE DAMAGES. Prospective damages in actions, such as for overflowing meadow lands and thereby injuring grasses for time to come, are allowed only upon proof that they are reasonably certain to occur.

DAMAGES TO HAY LANDS FOR FUTURE CROPS. Where in a suit for unlawfully overflowing plaintiff's grass lands, and thereby destroying crops, a judgment was given for damages already sustained, and also damages for loss of crops for the next two cropping seasons: *Held*, that the damage for the loss of future crops was entirely too prospective and conjectural, and that the judgment should be modified by striking it out.

ERRONEOUS INDIVISIBLE PART OF FINDING. If a finding contains erroneous matter, which cannot be divided from the remainder, the whole must fall.

GOLD COIN JUDGMENTS FOR DAMAGES. Under Sec. 202 of the Practice Act (Stats. 1869, 228) a judgment in gold coin for damages is proper.

CLAIMS FOR DAMAGES NOT DEBTS PAYABLE IN CURRENCY. A claim for damages is not (any more than a tax) a "debt" within the meaning of the Act of Congress relating to treasury notes, and the Legislature might therefore provide that a judgment therefor should be in gold coin, and not to be satisfied by payment in legal tender currency.

APPEAL from the District Court of the Third Judicial District, Washoe County.

Defendant, a corporation organized under the laws of England, has a mill in Washoe County, which is supplied by a large ditch or canal from the Truckee River. The water, after being used, is returned into the river. In the summer of 1869, on account of defects in the tail race or other causes, for which the Court below

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found defendant responsible, the contiguous lands of plaintiff were overflowed and his crops destroyed, and he claimed damages therefor, as well as for loss of crops, "for two cropping seasons to come." Suit was commenced February 14th, 1870.

Three other cases of substantially the same nature and against the same defendant were submitted at the same time and with this case, all being argued together by the same counsel. They were decided in the same way, and upon the authority of the decision in the present case. The plaintiffs in these cases, which were for injuries to adjoining tracts of land, were Theodore F. Lewis, John J. Woodworth and Woodworth & Lammon respectively.

Hillyer, Wood & Deal, for Appellant.

I. Where there is a conflict in the testimony, the Court will not, as a general rule, look into it to see whether witnesses have testified truthfully or not; but it seems to us that where, in a sworn complaint, a party claims double the damages he testifies to at the trial, the Court should not give his testimony as much weight as that of a witness who testifies positively, and who from his business understood what he was testifying about.

II. To entitle a party to recover at all for prospective damages he must allege them with distinctness, and they must be proved with certainty. The measure of damages in cases of this kind is the actual damages sustained prior to the commencement of the action; prospective damages cannot be recovered, nor damages to the permanent value of the realty, unless specially claimed in the complaint. (*Thayer v. Brooks*, 17 Ohio, 489.)

It is true that in cases where a tort is committed, damages may be given for matters that occur subsequent to the time of bringing the action, but the material and proximate consequences of the act are alone to be taken into consideration. Such matters must be proved with certainty. (*Curtis v. Rochester and Syracuse R. R. Co.*, 18 N. Y. 548; *Bousen v. Nurrell*, 3 Chand. [Wis.] 46; *Brannen v. Johnson*, 17 Maine, 361; 6 Cal. 163; *The Schooner Lively*, 1 Gallisen, 314; *Walrath v. Redfield*, 11 Barb. 369; *Fuich v. Brown*, 13 Wend. 601; *Witbeck v. N. Y. Central R. Co.*, 36 Barb. 647; *Nightingale v. Scannell*, 18 Cal. 326;

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McWhurter v. Douglas, 1 Cold. [Tenn.] 591; *Thomas v. Shattuck*, 2 Met. 615; *Brown v. Smith*, 12 Cush. 366; *Ingledew v. Northern Railroad*, 7 Gray, 86.)

III. If plaintiff could recover for two future seasons, why not for a dozen? It might happen, if this rule were allowed, that he could recover more than the actual value of the lands. The judgment should at least be modified by striking out this item.

Haydon & McElvaney, for Respondent.

I. The finding is substantially that by killing the grass for 1870 plaintiff was damaged \$300. If defendant had made default the Court below could have granted relief to the extent of the damage claimed in the complaint, and upon trial the Court could grant any relief consistent with the case made by the complaint and embraced within the issue. A damage of \$300 for killing grass for two seasons was alleged: the Court found damage by having such grass killed for one season. This was within the case made by the complaint, and consistent with the issue.

II. The injury stated in the complaint is the killing of the valuable grasses growing on the land at the time of the overflow, and that such overflow would bring up tule and worthless productions for two cropping seasons to come. The Court found that the overflow had killed the grass, and would produce the next year only half a crop, and the next only worthless grasses. The injury was done before the suit was brought; the direct and proximate result of such injury had killed the roots or germs of more than half the valuable grass growing on the land, and had germinated tule and other worthless productions. The damage was the difference between the yield of the land after the overflow and before the overflow, the Court finding from the evidence that the land would not produce by reason of the injury more than one half the crop it did in 1869, and the seasons before that time. There was nothing prospective about the damage: both the injury and the damage had been done before the suit was brought.

III. The damage accrued under the evidence without considering the cost of ridding the land of the noxious productions germ-

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inated by the water standing on it from July 15th, 1869, till February, 1870, when the suit was brought, and without considering the effect of the overflow on the crop of 1871. In *Harvey v. Sides S. M. Co.*, 1 Nev. 542, the Court holds that in cases of injury to land the cost of restoring it to its original condition is the true measure of damages, except when the cost would exceed the value of the land, in which case the value of the land would be the true measure of damages. In this case, under the evidence the injury would cost the loss of one half the crop in 1870 at any rate; nature might restore it after that; husbandry could not restore it before, for under the evidence the water remained on all the land until March, 1870, and it would have been too wet and too late to have plowed and sowed it after that, and realized a crop of grass in 1870.

By the Court, WHITMAN, J.:

This case was tried by the District Court without a jury, and judgment rendered for respondent, for sixteen hundred and twenty dollars in United States gold coin, coupled with an injunction. The judgment was for damages suffered by respondent by reason of the overflowing of his hay fields, and consequent injuries by water from appellant's tail-race, improperly constructed and negligently cared for. The injunction was for the prevention of future injury from the same cause. So far as the appeal is taken from the general judgment, save as hereinafter noticed, not only is there sufficient evidence to warrant the findings and judgment, but it vastly preponderates in favor of respondent; and the rule of decision where there is a conflict of evidence has been often enough announced to be considered settled. (*Covington v. Becker*, 5 Nev. 281.) The injunction was also fully warranted by the pleadings and evidence.

The only point upon which doubt arises is the allowance of three hundred dollars for that, as found by the District Judge, among other matters, this overflow spoken of had "killed the grass suitable for hay on his [Clark's] land, leaving it bare and thin in large portions, and bringing up the present season worthless grasses in lieu of good hay-grass growing on the same land last season, and

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causing such land to be capable during the season of 1870 to produce not more than half its usual crop, and thereby injuring plaintiff's land during the present season to the extent of three hundred dollars of its value."

This finding was based upon pleading which averred a damage of three hundred dollars, by reason of loss of crop for the next two cropping seasons; and upon evidence which showed that damage to be entirely prospective, and almost purely conjectural. Prospective damages in an action like the present are allowed only upon proof that they are reasonably certain to occur.

The proof as presented in the record does not come up to the rule. The case was tried in May of the present year, and the respondent testifies: "I have been over the land within the past few days. In some places tule is coming up, and in one or two small places no grass is growing. The grass is just commencing to come up now in the meadow land. I cannot tell what kind of a crop will grow this year, but in my opinion the land will be useless for two years to come. I consider that I will lose three hundred dollars by reason of the loss of the use of this land for these two seasons. I can't say that I know the effect water has upon land by standing on it. The land is dry now, and if no water runs on it hereafter the tules will die out and good grasses come back again. Prior to this year this land produced the finest quality of hay; now there is as much as fifteen acres bare of grass. Tule in spots is growing all over the ranch."

E. J. McClennan testified: "The water is all off the land now. It is impossible to say what kind of a crop will be produced this season on this land. * * * I saw the plaintiff's land yesterday. It is impossible to say whether any of the roots of the grass are killed. All land is benefited by water standing on it, if it does not stand too long."

Colwell testifies: "The water standing through the warm weather last summer and fall, and through this winter, on plaintiff's ranch, has drowned out the grass on at least one-fourth of his hay land entirely, and on other parts it is very thin, where last year and before it was very thick, and on an average it will not produce this year, in consequence of such overflow, over half the crop of

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hay it produced last year and before that time, and it will not be so good in quality.

Theo. F. Lewis testifies: Clark "had over one hundred acres overflowed last year. That land, except about ten acres, has always produced the very best hay, first quality. The hay last year, on this land, except on the ten acres, was worth ten dollars per ton, standing, and on an average would have yielded at least one ton to the acre. From appearances, much of it will produce water grass this season; about one-half of that land, from its appearance now, will produce a fair crop; the other half will be worthless. * * * I know the effect water has on land where it stands for a considerable time in that neighborhood. It brings up late and water grass, and kills out the grass of value for hay."

Taking all this testimony together, it will be seen that it is eminently uncertain and was insufficient to warrant the finding recited. Had the finding closed with the propositions that portions of the ground were bare and the roots of the grasses killed, it might have stood; but those propositions are connected with the bringing up of worthless grasses, and the non-producing qualities of the land for the season of 1870, which are prospective and uncertain. These propositions and the damages resulting therefrom cannot be divided, so the whole finding must fall. The amount thus found must be remitted.

It is objected that the judgment is for gold coin. The Practice Act of this State provides: "In all cases of damage the judgment shall be for gold coin." (Stats. 1869, 228, Sec. 202.) The Supreme Court of the United States has held that a judgment against a county treasurer for gold coin, collected for taxes under a statute of the State directing collection in such currency, was good upon the ground principally that as a tax was not a debt, nor in the nature of a debt, the Legislature might properly pass such a law: and such a claim could not be satisfied by the payment of the legal tender paper currency of the United States. (*Lane County v. Oregon*, 7 Wallace, 71.) A claim for damages is not a debt, and it would seem upon analogous principle to that underrunning the decision quoted, a State Legislature might lawfully make such provision as is contested here. The appellant here has offered no

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argument in support of its objection, and certainly this Court will not hunt reasons for abrogating a statute which is practically just, and whose object could undoubtedly be reached in every case by proof.

The judgment of the District Court will then be modified by deducting from its gross amount three hundred dollars ; otherwise it is affirmed.

HENRY FEUSIER, APPELLANT, v. GEORGE I. LAMMON
et als., RESPONDENTS.

JURISDICTION OF FEDERAL JUDICIARY. The decisions of the United States Supreme Court, upon questions of the jurisdiction of the Federal judiciary, are final and controlling.

JURISDICTION OF STATE COURTS, AS TO GOODS SEIZED UNDER UNITED STATES PROCESS. Where goods are seized and held by a marshal under valid process from an United States court, such process is a complete defense, and gives him the right to hold the property, against any writ issued from a State court.

QUESTION INVOLVED ON REPLEVIN AGAINST A UNITED STATES MARSHAL. Where a replevin suit was commenced in a State court against a marshal for goods seized by him under attachment process from a United States court: *Held*, that the State court could not extend its inquiry beyond the question as to whether the Federal process was valid ; and if so, that the question of title to the goods was irrelevant.

JUDGMENT IN REPLEVIN FOR UNITED STATES MARSHAL. In a replevin suit in a State court against a marshal for goods seized under a writ of attachment from a United States court, there is jurisdiction (if the property has been taken from the marshal) to render judgment in his favor for a return of the property or its value.

JURISDICTION OF COURTS TO RENDER JUDGMENT. The jurisdiction of a court to render judgment in a cause is coextensive with its authority to inquire into the facts.

APPEAL from the District Court of the Eighth Judicial District, White Pine County.

In March, 1870, one M. Manseau commenced an attachment suit in the United States Circuit Court against E. D. Feusier. Under the writ of attachment issued in the case, a stock of goods in a store in the town of Hamilton, White Pine County, was seized as the property of E. D. Feusier. The seizure appears to have

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been made by Henry A. Van Praag, Deputy Marshal, assisted by M. Buxbaum. This suit in replevin was commenced against them, as well as Marshal Lammon.

Tilford & Foster and Aldrich & Wren for Appellant.

I. If an action of trespass or trover should be brought by plaintiff, the production of this record would be a complete bar. It cannot therefore be said that the issue of ownership is immaterial. (*Buck v. Colbath*, 3 Wallace, 434.) For this reason the Court below should have dismissed the action, and not rendered final judgment. (*Ex parte Hill*, 5 Nev. 154; *Ableman v. Booth* and *U. S. v. Booth*, 21 Howard, 506; *Eberly et al. v. Moore et al.*, 24 How. 147; *The Mayor v. Cooper*, 6 Wallace, 247.)

II. The issuing of an attachment is not the act of the Court, but the mere ministerial act of the clerk. A plain distinction is made in the books between the two cases. The Court should have required proof of an existing indebtedness which would warrant an attachment, and of the affidavit and undertaking required by statute. (*Thornburgh v. Hand*, 7 Cal. 554.)

R. S. Mesick, for Respondents.

I. A Court has always a right, in renouncing jurisdiction for any cause in a case, to restore all rights lost, and correct all wrongs done by the use or abuse of its powers, or under color of its authority. The judgment goes no further than to restore the defendants to their original position, or its equivalent.

II. The regularity of the writ of attachment was as much a subject to be left to the United States Circuit Court, as was any other matter or question involved in the action wherein it was issued.

III. The plaintiff is not concluded as to his rights of property by the verdict and judgment in this case. (2d Smith's Leading Cases, [5th Am. Ed.] 671-680; *Sherman v. Dilley*, 3 Nev. 21; *Geller v. Huffaker*, 1 Nev. 26.)

IV. Defendants did not undertake to impeach any estate of the plaintiff, but only to present the defense of possession being

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held as officers of the United States Government, under process from a United States Court.

By the Court, LEWIS, C. J. :

Certain personal property having been seized by the defendant Lammon, upon a writ of attachment issued by the Circuit Court of the United States for the District of Nevada, against the property of one E. D. Feusier, the plaintiff Henry Feusier, claiming to be the owner of the goods so taken, brought this action in the State Court for the purpose of recovering them. In compliance with the writ issued from the State Court, the sheriff of White Pine County took the property from the custody of the marshal, and in due time delivered the same to the plaintiff, in accordance with the provisions of the Practice Act governing actions for the claim and delivery of personal property. The marshal, in his answer to this action, justified under the attachment; alleged that the property belonged to the defendant named in the writ, and claimed a return thereof. Upon the trial, after the plaintiff closed his case, which was principally confined to proof of a purchase by him of the goods in question from E. D. Feusier, prior to the issuance of the attachment, the defendant produced and introduced in evidence the writ, together with his return thereon. In aid of his case it was also admitted by the parties that the defendant Lammon was the United States Marshal for the District of Nevada, and that in his official capacity he took possession of the property sued for, as the property of E. D. Feusier, by virtue of the writ of attachment issued to him out of the Circuit Court. The District Court thereupon instructed the jury, that if they believed from the evidence that the defendant took and withheld the goods in dispute as marshal, under and by virtue of the writ of attachment in evidence, they must find a verdict for the defendant, and fix the value of said goods at three thousand dollars, "the sum agreed upon by the parties as the value." The verdict being for the defendant, it was adjudged by the Court that he "recover of the plaintiff the possession of the personal property described in the complaint, or three thousand dollars, in case a delivery of said property cannot be had." The plaintiff appeals, and contends that

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the Court erred: first, in giving the foregoing instruction to the jury; and second, in rendering judgment for the return of the property, whereas it should simply have dismissed the action.

Is the instruction correct? It is certainly in strict accord with the recent decisions of the Supreme Court of the United States, and upon questions of this character its decisions are final and controlling. *Freeman v. Howe*, 24 How. 450, is a case very similar to this. It appears that Selden F. White instituted suit in the Circuit Court of the United States for the District of Massachusetts, against the Vermont and Massachusetts Railroad Company, to recover certain demands claimed against it. At the commencement of the action an attachment was issued. The marshal, Freeman, to whom the process was issued, attached a number of railroad cars, which, according to the practice of the Court, were seized and held as security for the satisfaction of the demand in suit, in case a judgment was recovered by the plaintiff. While the cars were thus in the custody of the marshal, they were taken out of his possession by the sheriff, under a writ of replevin in favor of Howe and others, issued from the State Court. The marshal justified under the writ, but the State Court overruled his defense and rendered judgment for the plaintiff. This judgment was reversed, the Supreme Court of the United States holding that, although the writ of attachment had been wrongfully levied upon the property of a party not named in the writ, the rightful owner could not obtain possession of it by resort to the State Courts.

In setting aside the decision, the Court thus states the law touching the force and authority of a writ issuing from a Federal Court: "Another and main ground relied on by the defendants in error is, that the process in the present instance was directed against the property of the railroad company, and conferred no authority upon the marshal to take the property of the plaintiffs in the replevin suit. But this involves a question of right and title to the property under the Federal process, and which it belongs to the Federal, and not the State Courts, to determine. This is now admitted; for though a point is made in the brief by counsel for the defendants in error, that this Court had no jurisdiction of the case, it was given up on the argument. And in the condition of the present case, more than

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this is involved; for the property having been seized under the process of attachment and in the custody of the marshal, and the right to hold it being a question belonging to the Federal Court, under whose process it was seized, to determine; there was no authority as we have seen, under the process of the State Court, to interfere with it. We agree with Mr. Justice Grier in *Peck et al. v. Jenness et al.*, 7 How. 624-5. 'It is a doctrine of law too long established to require citation of authorities, that where a Court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment till reversed is regarded as binding in every Court; and that, where the jurisdiction of a Court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another Court.' 'Neither can one take the property from the custody of the other by replevin, or any other process, for this would produce a conflict extremely embarrassing to the administration of justice.' See also, *Buck v. Colbath*, 3 Wallace, 334.

The law as declared in these decisions, it will be observed, makes the writ in the hands of defendant Lammon a complete defense to the plaintiff's action, and gives him the absolute right to hold the property seized by him, against all or any writs issued from the State Courts. Such being the law, it is manifest it was not only proper, but it was the duty of the Court below to exclude from the case all considerations and evidence respecting the plaintiff's title to the property, when offered for the purpose of overcoming the writ. If the goods were seized and held under valid process from a Federal Court, the marshal had the unqualified right, so far as the State Courts were concerned, to retain the possession of them irrespective of any question of title—that is, the State Courts have no right to extend their investigation beyond the inquiry whether the property is held under valid process from a Federal Court. That fact being found in the affirmative, it is all the defense the Court should require on behalf of the marshal.

The instruction complained of is simply an affirmation of this proposition, and is undoubtedly correct under the authorities cited. But had the Court the power to render judgment for a return of

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the property or its value? We see no possible reason why it had not, or why in this case it should not have done so. If, as counsel for appellant claim, the State Court had no jurisdiction of this case, then clearly it had no authority to render such judgment. The assumption that it had not, however, is obviously untenable. If the action in the State Court were *in rem*, where the jurisdiction depends on the possession of the property, the position taken might be maintainable; but that is not this case. Here the Court had jurisdiction of the person of the defendant, the property was actually taken out of his possession upon its process, and by all the cases the Court had authority to determine whether the property in the defendant's possession was held by him under valid process from a Federal Court. If upon this inquiry the Court came to a conclusion in favor of the plaintiff, it will not be denied it might render final judgment in accordance with his rights; but if counsel's position be correct, it could give the defendant no protection in his rights; could render no judgment for him, if its conclusions upon the facts should be in his favor; nor even restore him to such rights as he may have lost by the process of the Court in this very action. We take it, there can be no doubt of the proposition that the right of every Court to render judgment is coëxtensive with the authority to inquire into the facts. Let us explain. If a Court has the right to inquire into the facts, for the purpose of determining who is entitled to the possession of certain personal property, it has the authority to render a judgment which will give effect to the conclusions so arrived at. Now it is not doubted but in this case the District Court had the right to carry its inquiries to the extent of ascertaining whether the marshal held the property under valid process from the Circuit Court, and if he did not, to award the possession of it to the plaintiff, providing he proved his right to it. This is certainly an inquiry as to which of the parties, the plaintiff or defendant, was entitled to the possession of the property. Why then might it not pronounce judgment in accordance with its conclusion upon the evidence? We think it might, and was fully authorized so to do.

Judgment affirmed.

Lewis v. Wilcox.

S. LEWIS, RESPONDENT, v. R. C. WILCOX, APPELLANT.

ANY SUBSTANTIAL EVIDENCE WILL SUPPORT A JUDGMENT. A judgment will be sustained as against an objection that it is contrary to evidence, if there be any substantial testimony for it to rest upon.

SALE—CHANGE OF POSSESSION. Where it appeared that Lewis purchased of Waddell certain mules and harness, giving therefor his two promissory notes for \$500 each, and crediting \$100 on an account; that he immediately took possession of them, and freighted with them for three or four weeks, driving them himself; that he then contracted to haul for Waddell, who was to pay therefor by the day, and also all the expenses of the team; that Lewis had paid one of his notes; that the team continued in Lewis' possession, though stabled in a barn owned by Waddell: *Held*, that the evidence was sufficient to establish an actual and continued change of possession, as against a claim of Waddell's creditors.

DECLARATIONS OF VENDOR AFTER SALE. In a question as to the validity, under the statute of frauds, of a sale of personal property, where the fact of the sale and change of possession was established: *Held*, that the declarations of the vendor made after such sale and change of possession were mere hearsay evidence, and not admissible to impeach or defeat the sale.

APPEAL from the District Court of the Fourth Judicial District, Lyon County.

Defendant was the constable of Silver City Precinct, in Lyon County. It appears that he seized the property referred to in the opinion, by virtue of a writ of attachment issued by a justice of the peace, in a certain suit of C. Osborn against J. A. Waddell and S. Lewis, claiming it to be and seizing it as the property of Waddell. There was a judgment for the plaintiff; and a motion for new trial being denied, defendant appealed.

W. M. Gates and Clarke & Wells, for Appellant.

The judgment was not warranted. There was not sufficient evidence under the statute of frauds, to show a sale of the property from Waddell to Lewis. There was not that immediate delivery and actual and continued change of possession required by section twenty of the statute of frauds. That section being copied, *verbatim*, from the statute of California upon the same subject, its exposition by the Supreme Court of that State should have great weight.

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(1 Nev. 218; 4 Nev. 361; 10 Cal. 519; 8 Cal. 561; 15 Cal. 506; 19 Cal. 329.)

Mitchell & Stone, for Respondent.

By the Court, LEWIS, C. J.:

The only assignments of errors upon this appeal are:

1st. "Insufficiency of the evidence to justify the decision in this: it is shown that the sale was fraudulent as to the creditors, no change of possession of the property having taken place, as required by the Statute," and

2d. "It is claimed the Court erred in excluding the testimony of the witnesses Osborn, Likins and Smith."

As to the first assignment. The District Judge by whom the case was tried, having found that the plaintiff was the owner of the property in question at the time of the seizure by the defendant, his decision must be maintained if there be any substantial testimony for it to rest upon. The evidence of the plaintiff Lewis we deem amply sufficient for this purpose. He testifies that "he purchased the mules and harnesses of one Waddell, on the ninth day of September, A. D. 1867, for eleven hundred dollars, giving him two promissory notes for five hundred dollars each, and crediting him with one hundred dollars upon an account held against him by the plaintiff. He also testifies that he immediately took possession of the property; that for three or four weeks after the purchase he was engaged in freighting with these animals, driving them himself; after which, he entered into a contract with his vendor to do hauling for him, by the terms of which it appears Waddell was to pay the plaintiff a certain sum per day and bear all the expenses of the team, together with all charges for the necessary repairs of the wagon. He also testifies that the team continued in his own possession from the time of the purchase until seized by the defendant, and that he had paid one of the notes given by him to Waddell. On his cross-examination, he stated that during the time he was thus engaged in hauling for Waddell he stabled his team in a barn owned by Waddell, and in which they were kept prior to the purchase."

This evidence most certainly shows an actual delivery and a continued change of possession of the property in dispute. There is nothing in it tending to negative the showing of a continued change, except, perhaps, the solitary fact that after the contract for hauling, the animals were kept in a barn in which they were stabled before the sale. This testimony, taken by itself, showing as it does an actual possession in the plaintiff, was sufficient to warrant the Court in finding that a delivery had taken place, and that there was a continued change of the possession. There was testimony, it is true, on the part of the defendant, which was rather incompatible with the conclusion; but with that this Court has nothing to do, for as stated in the outset, we will not disturb a verdict nor a finding by a Judge in an action of law, if there be substantial evidence to sustain it. (*Quint & Hardy v. The Ophir Silver Mining Co.*, 4 Nev. 307; *Covington v. Becker*, 5 Nev. 281.) On the first assignment, therefore, the judgment cannot be disturbed.

The testimony, the exclusion of which constitutes the second assignment of error, consisted simply of statements made by the vendor respecting the title to the property, and offers made by him to sell it long after the sale, and while it was in the possession of the vendee. The sale being established, the declarations of the vendor made afterward would be mere hearsay, and not admissible to impeach or defeat it. The only tendency which the evidence offered could possibly have, was to disprove the sale from Waddell to the plaintiff. The declarations of a vendor remaining in possession of the property after the sale, and made while so in his possession, are sometimes received in favor of creditors to impeach or destroy the sale. (See Cowen & Hill's Notes, 602.) But they are never received after the completion of the sale, and the possession has been transferred. The vendor then stands in no different position than an entire stranger to the transaction and the property; and it is a well established rule, that in such case his declarations are not admissible. The Court below, therefore, properly ruled out the declarations of Waddell.

The judgment must be affirmed. It is so ordered.

Leet v. The John Dare Silver Mining Company.

LEMUEL LEET *et al.*, RESPONDENTS, v. THE JOHN DARE
SILVER MINING COMPANY, APPELLANT.

WHITE PINE MINING LAWS—NECESSARY WORK PER YEAR TO HOLD MINE. Under the mining laws of White Pine District, as amended in July, 1867, it requires only two days work to hold a "location" for a year; and such location means an entire mining claim, irrespective of the number of locations or feet.

MEANING OF "LOCATION" IN WHITE PINE MINING LAWS. The word "location," as used in the mining laws of the White Pine District means the aggregate of ground claimed as a mine, and not the interest of a single shareholder.

APPEAL from the District Court of the Eighth Judicial District, White Pine County.

The plaintiffs, Lemuel Leet, Franklin Learned, Samuel C. Fleming, John Bicknell, G. N. Leet, Edward Green, Charles Stimpson, A. J. Gove, Beatty Elliot and W. H. Stars, sued the defendant to recover the "Happy Jack Ledge," at Treasure Hill, White Pine County; and also prayed for an injunction to prevent the removal of ore therefrom, and for damages for ore already removed. The cause was tried before a jury, and there was a verdict for plaintiffs, upon which judgment was entered in their favor for restitution, damages, and a perpetual injunction. A motion for a new trial having been denied, defendant appealed.

Robert M. Clarke, A. C. Ellis and Tilford & Foster, for Appellant.

By what rule or definition can an unsegregated interest of a mining claim, having no particular locality, nor defined nor ascertained limits, except as it is bounded by the mining claim of which it forms an undivided part, be denominated a "location"? It is not what is meant by the term "location." (*Coleman v. Clements*, 23 Cal. 246.) The term means the act whereby a mine is established; the claim of right to a definitely ascertained piece of mining ground. "Notice of location," "mining location," "our location," "the Bulwark Company's location," "the Yellow Jacket location," are common and every-day expressions, in every case signifying the whole extent of the territory claimed for mining purposes, and in no case signifying a fractional part only.

Thomas P. Hawley, for Respondents.

The mining laws require that two days work shall be done for each claim or location of two hundred feet, in order to acquire the right to hold the claim for one year. The language is sufficiently clear and plain to indicate the intention of the miners to be such, and upon reading every section of the laws, it is apparent on the face thereof that such was their meaning.

The mining laws, as we understand them, are sanctioned by the law of Congress, which also fixes the use, meaning and definition of the disputed language. The Act of July 26th, 1866, uses the words, "no *location* shall exceed, etc."

The question is simply, what was the intention of the miners? and the intention, as in all cases of construction of writing, public or private, is to be gathered from the language used and from the whole document.

By the Court, JOHNSON, J.:

The record here shows that there is a controversy between the above-named parties respecting the right of possession to certain described mining ground in the White Pine District in this State. At the trial had in the Court below, plaintiff obtained judgment, and a new trial being denied, upon application of defendant this appeal is brought from both the judgment and the order denying a new trial.

Each party claims under the mining rules and regulations of said district, subordinate necessarily to the Federal laws applicable thereto; and the facts, so far as we consider them material or necessary in determining the question raised on this appeal as agreed to, may be stated thus: The White Pine mining district was organized on the 10th of October, 1865, at which time the miners of said district adopted certain rules and regulations respecting the location and holding of mining claims therein. On the twentieth of July, 1867, amendments were made to these rules and regulations in certain particulars. It should furthermore be stated that in this appeal no question is raised as to the regularity of proceeding in adopting the amendments referred to.

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The original rules and regulations provided that "each claimant shall be entitled to hold by location two hundred feet on any lead in the district." No specified amount of work on a location thus authorized was required, whereas the amendments of July, 1867, seem to have been intended chiefly to supply this omission. The amended laws bearing upon the questions before us, read as follows: *Second*—When a claim is located and the proper notice put on it, there shall be allowed ten days to file a notice for record, and thirty days additional time, within which the proper amount of work must be done on the ledge. *Third*—All locations already recorded shall have two days work done on them for every location, on or before the first day of February in each year, which work shall hold good, until the twentieth of July of the same year, and all locations made hereafter shall have the same amount of work done on them within forty days after locating them; which work shall hold good for one year from the date of the record of such work. *Fourth*—Any location having the necessary amount of work done on it, as in the previous article, shall have the same surveyed and the work recorded by the recorder within ten days after said work is done. *Fifth*—Any claim upon which the necessary work is not done by the first of February shall be subject to re-location. *Sixth*—Any claim [claims] having the necessary work done upon them within three months previous to the adoption of these by-laws, shall be considered as having done work to hold for one year from this date, the same being duly recorded as per article fourth. * * * *Ninth*—Work done upon any portion of a location shall be deemed as having been done for the benefit of the whole of said location, except as in case as stated hereinafter. * * * *Eleventh*—In case when a portion of a company refuse to do the necessary amount of work to hold their claim, after being notified, by placing a written notice on the recorder's office for twenty days, and the other portion of the company wish to work enough to hold their part of the said claim, they shall give notice in writing of their intention to the recorder, and designate what part of the claim they wish to hold, and have the work recorded for that part of the claim, and the balance of said claim shall be subject to re-location if the laws are not complied with."

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On the eighth day of June, 1868, the grantors of the "John Dare Mining Company" (defendants) located the "Bulwark mine" of twelve hundred feet, (six locations of two hundred feet each) and within forty days thereafter did two days work on the entire claim. On the eighteenth day of February, 1869, Leet *et als.* (plaintiffs) located eight hundred feet of the mining ground embraced in that of defendants, known as "The Happy Jack." There were three locations in this company, claiming for each one two hundred feet; also an additional two hundred feet as a discovery claim, to be divided equally between them. It also appears that within forty days thereafter, these parties had work done on the ground thus located of at least two days for each two hundred feet of said location.

Passing other points made on the hearing of the appeal, we rest our decision on one question in the case which we regard as decisive: Do these mining laws require two days work for each two hundred feet, or two days work for the entire mining claim, irrespective of the number of locators or feet? The rulings and instructions of the Court below, properly brought before us by the exceptions, hold in effect, that the earlier locators—the interest represented by "The John Dare Co."—had forfeited their rights and rendered the mining ground in controversy subject to re-location under the mining laws of the district at the date of the latter location, (February 18th, 1869) for the reason that they had not done two days work for each two hundred feet of the ground they claimed by the "Bulwark mine" location in June, 1868. If the two days work was sufficient to hold the Bulwark mine—twelve hundred feet—the plaintiff had no right to re-locate any portion of the ground of defendants, and consequently the judgment should be reversed.

It will be seen that section third of the mining laws uses the words "locate," "locations" in the sense as the aggregate of the ground claimed by the parties, and *not* as the interest in common of a single shareholder. The proper steps being taken, the co-locators have no separate interests, but a common interest, which in itself is not susceptible of division or representation, except under proper judicial proceeding or section eleventh of the mining rules.

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Why then attach a responsibility, or worse yet, make a *forfeiture* of a right which is not usually favorably considered by Courts? (Smith's Commentaries, Secs. 459, 468, 495 to 499; *Coleman v. Clements*, 23 Cal. 248.)

Section third of these mining laws thus construed harmonizes with other parts of the same laws, as will be seen from the quotations already given, especially section fourth. The entire mining law must be taken and construed together, if need be, and if possible, made to harmonize. (32 Cal. 95; 31 Cal. 240.)

On a full examination of the record in this case, we conclude that in view of the facts shown by defendants in respect to the amount of work done on the location of June 8th, 1868, by their predecessors, that it was sufficient under the mining laws of the district, and consequently the plaintiffs had no right upon that question alone to relocate any portion of the ground claimed by defendants: wherefore the judgment is reversed and cause remanded.

JOHN CONLEY, APPELLANT, *v.* GEORGE W. CHEDIC,
RESPONDENT.

TAX SALES OF PERSONAL PROPERTY—INJUNCTION. Where a complaint to restrain a county assessor from selling certain personal property for taxes alleged that he would sell unless restrained, and thereby damage plaintiff in a certain amount of money: *Held*, that as the amount of damages was exactly stated and there was no showing that a judgment therefor could not be collected, there was no case for a restraining order, injunction or other equitable relief.

JUDGMENT CORRECT THOUGH REASON WRONG. If a judgment be right, though decided upon a wrong ground, it will not be disturbed by the Supreme Court.

EQUITY JURISDICTION—REMEDY AT LAW. Equity will not take jurisdiction where there is a full, complete and adequate remedy at law; that is, where the wrong complained of may be fully compensated in damages which can easily be ascertained, and it is not shown that a judgment at law cannot be satisfied by execution.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

It appears that the wood and timber referred to in the opinion were cut in Alpine County, California, and were then put into the

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Carson river for the purpose of being "driven" to market in this State. Having come first into the County of Douglas, they were there assessed, and the taxes paid, the assessor refusing to allow them to pass beyond that county until such payment. They then were driven to Ormsby County, where they were again assessed, and the owner refused to pay.

T. W. W. Davies, for Appellant.

I. Taxes are due and payable in the county where the property is first assessed; and if the property, after it has been assessed, be removed into another county and there assessed, the first assessment is unaffected thereby and the payment of the latter assessment is not a discharge of the former. (Stats. of 1864-5, 275, Sec. 6; *People v. Holladay*, 25 Cal. 307.)

II. The State tax having been levied and collected in Douglas County, *that* tax could not be again collected in another county. (10 Vermont, 506; 8 Black. 335; *Hardenburgh v. Kidd*, 10 Cal. 402.)

III. As matter of equity and good conscience, the tax on wood driven down the Carson river ought to be collected in Douglas County, as the valuable lands along the river in that county are more or less injured every season by the overflows and deposits occasioned by these drives.

Thomas Wells, for Respondent.

If the property, when assessed in Douglas County, was merely *in transitu*, and the findings are that it was, then it was illegally assessed in that county. (Stats. 1864-5, 274, Secs. 5, 6.)

By the Court, LEWIS, C. J. :

A restraining order was granted in this case upon a complaint setting out that the State and County taxes for the year 1870 on certain wood and timber belonging to plaintiff had been regularly assessed and paid in the County of Douglas, and that the defendant, who is the assessor of the County of Ormsby, subsequently assessed the property in the latter county for the taxes of the same

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year; and the plaintiff having refused to pay the same, defendant advertised the property for sale for the payment thereof. It is also alleged that if not restrained he will sell it, and thereby damage the plaintiff in the sum of three hundred and sixty-four dollars and sixty cents. The pleading concludes with a prayer for a preliminary restraining order, and that it be made perpetual upon the hearing. The trial resulted in a judgment dismissing the action, from which plaintiff appeals.

The judgment is undoubtedly right, not upon the ground taken by the Judge below—namely, that the assessment in Douglas County was illegal and void—but for the reason that the complaint does not make out a case for a restraining order, injunction, or other equitable relief.

Equity will not take jurisdiction or interpose its powers when there is a full, complete and adequate remedy in the ordinary course of law; that is, when the wrong complained of may be fully compensated in damages, which can easily be ascertained, and it is not shown that a judgment at law cannot be satisfied by execution. (See *Sherman v. Clark*, 4 Nev. 138.) In this case, the damages from the apprehended injury are exactly stated in dollars and cents, and there is no showing that if a judgment were recovered for the same it could not be collected. The remedy in the ordinary course of law is shown by the complaint itself to be complete and adequate: hence this proceeding was properly dismissed.

Judgment affirmed.

FRANK F. JOHNSON, RESPONDENT, v. WELLS, FARGO &
CO., APPELLANT.

PRACTICE ACT, SEC. 332—STATEMENT ON APPEAL FROM ORDER. The word "order," in section three hundred and thirty-two of the Practice Act, providing for a statement on appeal from a judgment or order, does not refer to the ordinary order upon a motion for new trial.

STATEMENT ON APPEAL FROM NEW TRIAL ORDER. On appeal from an order granting or refusing a new trial, any matter properly pertaining to such order, except it may have arisen subsequent to the notice for the motion, may be considered without any other statement than that used on the motion for new trial.

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WAIVER OF WAIVER — TIME TO MAKE STATEMENT ON APPEAL. A failure to make a statement on appeal within twenty days after the entry of judgment is equivalent to a waiver of such statement; but such waiver may be itself waived; and a stipulation that the statement on new trial shall be also the statement on appeal, though made more than twenty days after judgment, is such a waiver.

PRESUMPTION THAT JURIES FOLLOW INSTRUCTIONS. The presumption in all cases of jury trials is that the jury apply the law as given by the Court, and upon such law and the evidence render their verdict; and no appellate Court can decide the effect of the one separate from the other.

BODILY SUFFERING AS SOURCE OF DAMAGE. Though it is difficult to conceive how bodily pain and suffering can be estimated in dollars and cents, yet it is well settled that a recovery can be had for them as damages, in actions against passenger carriers for personal injuries occasioned by negligence.

PAIN OF MIND AS AN ELEMENT OF DAMAGE. In an action against a passenger carrier for personal injuries, occasioned by the breaking down of a stage coach, it is error to instruct the jury in estimating damages to take into consideration plaintiff's "pain of mind," as distinct from his bodily suffering.

COMPENSATORY DISTINCT FROM PUNITIVE DAMAGES. In actions against passenger carriers for personal injuries occasioned by their negligence, the rule of damages is based upon the idea of compensation and not of punishment.

DAMAGES AGAINST PASSENGER CARRIERS FOR NEGLIGENCE STRICTLY COMPENSATORY.

The only damages that can be recovered in an action against a passenger carrier for personal injuries occasioned by negligence are strictly compensatory, including damages for bodily pain, and so much only of mental suffering as may be indivisibly connected therewith.

"CHARACTER" OF INJURED PERSON NOT INVOLVED IN SUIT FOR NEGLIGENCE. In an action against a passenger carrier for personal injuries caused by negligence, the character of plaintiff cannot be considered as an element of calculation, in estimating the amount of damages; and an instruction submitting it to the jury for such purpose is error.

APPEAL from the District Court of the Eighth Judicial District, White Pine County.

Plaintiff was a passenger in one of defendant's coaches running from Elko to Hamilton, in March, 1869. On the way and near Jacob's Wells, it was discovered that one of the axles had heated; and upon the wheel being taken off, to pour water upon the spindle, the driver remarked that he was afraid the axle would "weld" before the coach could reach Newark, eleven miles distant, where he could change for another coach. Upon arriving at Newark it appeared that the other coach needed some slight repairs, whereupon the driver determined to drive on the coach with the heated axle, and made some remark about going through ahead of Lew. Wines',

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which had just then arrived at Newark. After some further attempts to cool the axle, the coach started forward again, and soon afterwards the axle snapped and the coach toppled over, throwing a large iron casting upon plaintiff's knee, and occasioning bruises and injuries to his head, hip and spine. After the break, the driver returned to Newark, and in the course of an hour the other coach was repaired, with which the passengers were carried to Hamilton.

Garber & Thornton and *A. C. Ellis*, for Appellant.

I. A man's character is not directly or remotely involved, nor should it in anywise be taken into consideration by a jury in making up a verdict upon a question of damages from injury to the person. A man with a bad character can suffer as much bodily pain from an injury to the person, as a man with a good character. But here the jury were told that they might speculate as to the probabilities of plaintiff's enjoying a lucrative business, or finding employment in consequence of his character as a business man, and of the surroundings at the time of the injury or thereafter: this was error. (31 Mo. 117; 5 Minn. 440; 11 Ind. 552.)

II. The jury were told that they should consider, in connection with the character of plaintiff, his pain of mind, the anguish he might have suffered in consequence of some disappointment in business, or some failure to realize a hope he had cherished: this was error. (2 Greenleaf Ev. 267 and cases cited.)

Thomas P. Hawley, for Respondent.

I. The error complained of should not be considered, because no statement on appeal was filed or served within twenty days after the motion for new trial was overruled. It is true, it was stipulated that the statement on motion for new trial might be used and referred to with like effect as if it had been filed and settled as a statement on appeal; but it could not take effect as a statement on appeal until the signing and filing of the stipulation; and this not being within the time limited by the statute, the statement on appeal should not be considered by the appellate Court. (*Ryan v. Dougherty*, 30 Cal. 221; *Harper v. Miner*, 27 Cal. 114.)

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II. Damages sustained from pain of mind are not special in their character. The plaintiff is entitled to recover all damages arising from the attendant circumstances of the principal transaction, and the natural results flowing therefrom. Mental anguish necessarily follows from bodily sufferings, and is the natural result of an injury to the person. It is a part and parcel of the actual injury, for which the party injured is entitled to compensation in damages. It is damage just as necessarily arising from the injury as loss of time or expenditure of money. (*Fairchild v. Cal. Stage Co.*, 13 Cal. 601; *Ransom v. N. Y. & Erie R. R. Co.*, 15 N. Y. 416; *Morse v. Auburn & S. R. R. Co.*, 10 Barb. 623; *Curtis v. Rochester & S. R. R. Co.*, 10 Barb. 291; 18 N. Y. 542; *Williams v. Vanderbilt*, 28 N. Y. 224; *Canning v. Inhabitants, etc.*, 1 Cush. 452.)

III. The word "character," as used in the instruction, applied to physical health, and was there used to distinguish the difference as to plaintiff's character *before* and *after* the injury. The jury was simply instructed to consider what character of a man plaintiff was before the injury, as to being sound and strong, able to do and perform manual labor without mental pain or bodily sufferings, and what character of a man he was after the injury, as to being crippled, unable to pursue his usual avocation, and deprived of the use of his limbs. Such were the character and business of the plaintiff that the jury were to "take into consideration." No other construction could reasonably be given to the meaning of the word "character" under all the facts and circumstances; no evidence was offered in reference to his moral or intellectual character, or in regard to his skill or learning in any branch of business. And if the word had been used in that sense, it would have no bearing on the case, and could not possibly have misled the jury, or had any effect whatever beyond their verdict.

IV. A verdict will not be set aside because of misdirection in any immaterial matter, or where a charge has, though erroneous, no bearing on the issues. (*Honer v. Wood*, 16 Barb. 391; *Alston v. Jones*, 17 Barb. 276; *Garden v. Clark*, 17 Barb. 538; *Wood v. Gibbs*, 35 Miss. 559; *Eyser v. Weissjaba*, 2 Clarke, 463; *Western Stage Co. v. Walker*, 2 Clarke, 504.)

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V. The case was fairly submitted to the jury, and tried upon its merits. In such a case, it would amount to a denial of justice to grant a new trial upon the ground that the Court gave an erroneous instruction upon a point wholly immaterial, having no relevancy or bearing in the case, and in regard to which no testimony was offered.

By the Court, WHITMAN, J. :

The respondent objects to a consideration of this appeal because it is said there is no statement on appeal.

There is a statement on motion for new trial. The appeal is taken from an order denying the motion, and from the judgment. In addition, there is a stipulation to this effect: "It is stipulated in the above action that the statement on motion for new trial herein, as on file and settled, shall be also the statement on appeal, and may be used and referred to with like effect as if the same had been duly filed and settled as a statement on appeal herein."

This stipulation was not made until twenty-four days after the order denying the motion for new trial, and the form of objection to the consideration of the statement is, that "no statement on appeal was filed or served within twenty days after the motion for new trial was overruled," citing the statute as follows: "When the party who has the right to appeal wishes a statement of the case to be annexed to the record of the judgment or order, he shall within twenty days after the entry of such judgment or order prepare such statement." (Statutes of 1869, 248, Sec. 332.)

That the word order as used in the section quoted has no reference to an order made upon a motion for new trial, (except when a statement becomes necessary in order to present some matter properly to be reviewed upon an appeal from an order granting or refusing a new trial, which could not be included in the statement upon the motion therefor) is evident from another portion of the same statute reading thus: "The statement thus used (on motion for new trial) in connection with such pleadings, depositions, documentary evidence on file, testimony taken by a reporter, and minutes of the Court as are read or referred to on the hearing,

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shall constitute without further statement the papers to be used on appeal upon the order granting or refusing a new trial." * * * (Statutes 1869, 227, Sec. 197.)

Thus it will be seen that any matter properly pertaining to such order, (except it may have arisen subsequent to the notice for the motion) or arising upon the pleadings, may be considered by this Court without other statement than the one contained in the transcript, and such was the holding before the enactment of the specific statutory provision. (*Bryant v. The Carson River Lumbering Company*, 3 Nev. 314.)

If, however, there was any necessity for considering the statement in the record, as a statement on appeal, distinct from its statutory office as a statement on new trial, the stipulation would allow it; for although by failure to make the statement within twenty days after the entry of the judgment, appellant would in the absence of any agreement to the contrary be held to have waived the same, (Statutes of 1869, 248, Sec. 333) yet such waiver could be waived by the opposite party in any case; and has been so here, if there is any meaning or force in language. No such necessity, however, arises here, as the only substantial objection taken on appeal is upon the single ground of misdirection to the jury in a certain instruction given.

The action was against the appellant, a corporation, as a passenger carrier, for personal injury to respondent arising from the negligence of appellant in furnishing an unsafe coach for transportation, by the breaking down of which the injury complained of was caused. The jury rendered a verdict in respondent's favor, for forty-five hundred and twenty-five dollars, and there is no reason for disturbing it, unless they took into consideration improper elements for its formation. It is urged by respondent that the verdict should not be set aside "because of the misdirection by the Judge, if it appear that the result would have been the same, regardless of the misdirection, or when the verdict is warranted by the evidence."

The jury must be governed by both law and evidence, the latter as detailed by witnesses, the former as given by the Court; and no appellate Court can decide the effect of the one separate from

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the other, the presumption being in all cases that the jury apply the law as given, and upon the law and evidence render their verdict.

Again, it is urged, "the erroneous charge of a Judge having *no bearing* on the issues, should be disregarded on a motion for new trial," and "the giving of an instruction inapplicable to the evidence is not a fatal error for which a new trial will be granted." Within proper bounds, and in cases perfectly clear, these propositions are true, but they do not touch this case, as will be seen by the recital of the instruction complained of, which was vital to the case, and if wrong, must necessarily have misled the jury.

Here it is :

"In estimating damages the jury should take into consideration the bodily suffering of the plaintiff, his pain of mind, his character, and his business, also all expenses, if any, incurred on account of the injuries he received, and the employment of physicians, and nurses, medicines and board, and also whether the injuries are likely to be permanent."

The law is well settled that in an action like the present, a plaintiff may recover for bodily suffering; though were it a new question, it may well be doubted whether any satisfactory reason could be given for the rule, upon the received theory of the action, which is purely compensation for the injury; as it is difficult to conceive how bodily pain or suffering can be estimated in dollars and cents. Such, however, is the undoubted rule upon authority.

Omitting the words, "his pain of mind, his character," the remainder of the instruction states the law correctly, and was applicable to the pleadings and evidence in this case. Whether these words should have been used is the question here, as they present two distinct elements of damage for the consideration of the jury, and must be supposed to have influenced the amount of the verdict more or less—how much or how little it is impossible to tell.

Of course, there can be no bodily suffering without pain of mind, and to that extent pain of mind is a proper subject for compensation; but in such consideration there is no subdivision. The proposition here is, that as a distinct and separate cause of damage such pain may be estimated. In the authorities there is an appa-

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rent confusion, but more apparent than real. Mr. Mayne says: "Pain and suffering undergone by the plaintiff are also a ground of damage." (Mayne on the Law of Damages, 264.) This language is very general, and the only citation in its support is the case of *Blake v. Midland Railway Co.*, 18 Q. B. 111, (A. & E. 110.) That action was brought by a widow on the death of her husband, and Coleridge, J., deciding that in such a case mental anguish could not be considered, utters the following dictum: "When an action is brought by an individual for a personal wrong, the jury in assessing the damages can with little difficulty award him a *solatium* for his mental sufferings alone, with an indemnity for his pecuniary loss." This decides nothing, although the dictum of a wise Judge.

The rule is stated in a recent work as follows: "In an action for negligent injury to the person of the plaintiff he may recover * * * a fair compensation for the physical and mental suffering caused by the injury." Upon the word "mental" is this note: "The jury in estimating the damages may take into consideration the anxiety and mental suffering of the plaintiff at the time of the occurrence of the injury, naturally incident to the risk and danger of the occasion." "The mental suffering and anxiety caused by the apprehension of danger, or by efforts to escape from the consequences of the injury, may be considered by the jury." Shearman & Redfield on Negligence, 662-3, Sec. 606.) To maintain these propositions three cases are cited, two from Connecticut and one from Massachusetts.

The case of *Masters v. Warren*, 27 Conn. 293, is simply affirmatory of *Seeger v. Burkhamsted*, 22 Conn. 298, so it will be sufficient to quote the language of the latter, which is to this effect: "Such actual injury is not confined to the wounds and bruises upon his body, but extends to his mental suffering. His mind is no less a part of his person than his body; and the sufferings of the former are oftentimes more acute and also more lasting than of the latter. Indeed, the sufferings of each frequently, if not usually, are (act?) reciprocally on the other. The dismay and consequent shock to the feelings which is produced by the danger attending a personal injury, not only aggravate it, but are frequently so appalling as to

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suspend the reason and disable a person from warding it off; and to say that it does not enter into the character and extent of the actual injury, and form a part of it, would be an affront to common sense.

In the Massachusetts case, Metcalf, J., says: "The argument for the defendant assumes that the plaintiff sustained no injury in his person, within the meaning of the statute, but merely incurred risk and peril which caused fright and mental suffering. *If such were the fact, the verdict would be contrary to law.* But we must suppose that the jury, under the instruction given to them, found that the plaintiff received an injury in his person—a bodily injury—and that they did not return their verdict for damages sustained by mere mental suffering caused by the risk and peril which he incurred. And though that bodily injury may have been very small, yet if it was a ground of action within the statute, and caused mental suffering to the plaintiff, that suffering was a part of the injury for which he was entitled to damages." (*Canning v. Williamstown*, 1 Cush. 452.)

Upon a close examination of the facts and full opinion in the cases cited, it will appear that the mental suffering allowed for therein was that preceding and at the time of the injury. So that they do not go so far, nor make the allowance so general, as the instruction in the present case; but even thus restricted, they introduce an element dangerous, because purely imaginative. How can such damages be estimated in money? The mental agony of a timid woman would be entirely different from that of a bold man. No two cases could be weighed in like scales. To properly estimate such a cause of damage, the door must be opened to the realms of philosophy, physiology, and psychology. Again, the cases do not cohere. Connecticut says the "mind is no less a part of the person than the body," and hence there need be no bodily injury to allow a recovery; but Massachusetts says, there must be some bodily injury upon which to base the action.

As the object here is to trace this rule, if rule there be, allowing damages for mental pain, and to ascertain if possible its basis, and to consider if that be sound; note in this connection, that the Hon. Isaac T. Redfield, in a work equally recent, states the rule

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thus: "But it has always been held in this country, that the bodily pain and suffering caused by an injury for which one party is legally entitled to claim compensation of the other, were legitimate elements, to be proved and considered by the jury in estimating the pecuniary compensation which they shall award, notwithstanding the difficulty of reducing pain and pence to a common measure."

"In actions against carriers of passengers for injuries, there seem, as we have said, to be no well defined rules for estimating damages. It is a matter to be submitted to the sound discretion and judgment of the jury, who are to consider the *actual loss* to the plaintiff, present and prospective, which is the very lowest amount they will feel justified in giving in any case. Beyond this, any rule for damages must be regarded as more or less *terra incognita*." (Redfield on Carriers, Sec. 431, 433.)

Here, it will be seen, the author ignores mental pain as any separate and distinct element of damage. He reiterates the same doctrine in another work. (Redfield on the Law of Railways, 222.)

Mr. Sedgwick says: "The damages for a personal injury in cases of simple trespass, free from malice, or of simple negligence, (where the rule seems to be the same) should, as far as a money standard is applicable, be such as to compensate the injured party for such loss of time, medicine and other expenses, physical pain, and as it seems also mental distress, as are fairly and reasonably the plain consequences to him of the injury." * * * "The latter element of compensation is very clearly justified by the decisions in the State of Connecticut, which hold that the plaintiff is entitled to a pecuniary equivalent for the apprehensions and anguish of mind naturally excited by the risk and danger at the time of the injury." (*Seger v. Barkhamsted*, 22 Conn. 290; *Masters v. Town of Warren*, 27 Conn. 293; *Lawrence v. Housatonic R. R. Co.*, 29 Conn. 390.)

So also in Maine, (*Mason v. The Inhabitants of Ellsworth*, 32 Maine, 271.) And in California, (*Fairchild v. Cal. Stage Co.*, 13 Cal. 599.) So in a very late case, the Supreme Court of the United States say that in these actions "there can be no fixed measure of compensation for the pain and anguish of body and mind, nor for the loss of time and care in business, or the permanent injury to health and body." (*Illinois Central R. R. Co. v. Bar-*

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ron, 5 Wallace, 90 ; Sedgwick on Damages, 648, note.) It will be seen that the author takes the same view of the scope of the Connecticut cases as has been hereinbefore expressed.

The Maine case does not sustain the text, as Howard, J., there says: "The jury were instructed that in their assessment of the damage, they should compensate the plaintiff for his suffering of bodily pain. We consider that ruling to be correct, and that it is in harmony with the decisions in this and in other States, and that it is now the settled doctrine". (*Verrill v. Minot*, 31 Maine, 299.) Tenney, J.: "It has been settled in *Verrill v. Minot*, that such an allowance is proper." The objection was that "the instruction that the jury should compensate for bodily pain was erroneous."

Turning to *Verrill v. Minot*, we find the same state of facts; the objection being that "the bodily pain was not a legitimate item of damage. There is no standard to compute by. The allowance of it arose from assimilating the suffering to that in slander." To which the Court replies: "The statute allows a recovery for 'bodily injury.' That is something else than loss of time and expenses. Pain is a part of bodily injury inherent in it. Though difficult to admeasure and assess, the injured party is entitled to recover for it. It must be confided to the sound discretion of the jury." Thus it appears that the rule in Maine is precisely the same intimated heretofore in this decision.

In *Fairchild v. Cal. Stage Co.*, 13 Cal. 599, this important question is thus curtly settled: "The fourth instruction is objected to because it asserts that the plaintiff, if entitled to recover, may recover damages for 'mental anguish.' We cannot see why compensation should not as well be given for pain of mind, as pain of body." Counsel in the case, in support of the instruction, cite only the oft repeated case of 22 Connecticut.

In the Supreme Court of the United States, it is said argumentatively solely, in an action for damages in the death of a party; that, "If the suit is brought by the party, there can be no fixed measure of compensation for the pain and anguish of body and mind, nor for the loss of time and care in business, or the permanent injury to health and body." (*R. R. Co. v. Barron*, 5 Wallace, 90.)

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When it appears, as has been shown, that the author's text depends entirely upon a dictum of the Supreme Court of the United States and the cases from Connecticut, it is not surprising that he guardedly says, "And as it seems also mental distress": there is no warrant for putting it any stronger, if so strongly.

Counsel for respondent in support of the instruction cites some of the cases already referred to, and several others, none of which, however, even apparently support the point under discussion except that of *Ransom v. The N. Y. & Erie R. R. Co.*, 15 N. Y. 415, and there the question did not arise, as will be seen by reference to the instruction, which was that "the plaintiff was entitled to recover the necessary expenses he had incurred for nursing and medical aid, for the bodily pain and suffering resulting from the injuries," * * * and the exception was, "to that part of the charge in which the Judge stated that the jury might award damages to the plaintiff for his bodily pain and suffering." The case in 10 Barbour, relied on by the Court in 15 New York, and by counsel in this case, is certainly against their position; for the Court there says, "exemplary or punitive damages, or smart money, as they are sometimes called, are given by way of punishment for intentional wrong, and to operate as an example to others. The law in such cases looks beyond the act and its injurious consequences to the motives, and metes out its punishment to that also. In such cases, the compensation for the actual pecuniary damage is rather subsidiary and incidental. There, the mental suffering, the injured feelings, the sense of injustice, of wrong or insult on the part of the sufferer, enter largely into the account, and the measure of justice is graduated by that of the offender's turpitude. Here the damages are strictly compensatory for the actual injury, of which the bodily pain and suffering were an essential part. Nothing was authorized to be allowed by way of punishment or example, in reference to motives, or by way of compensation for the trouble of seeking redress." (*Morse v. Auburn & Syracuse R. R. Co.*, 10 Barb. 625.) Here the rule is correctly stated as laid down by Greenleaf. "Injuries to the person or to the reputation consist in the pain inflicted, whether bodily or mental, and in the expenses and loss of property which they occa-

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sion. The jury, therefore, in the estimation of damages, are to consider not only the direct expenses incurred by the plaintiff, but the loss of his time, his bodily sufferings, and if the injury was willful, his mental agony also." (2 Greenleaf Ev. Sec. 267.)

It is safe to say, that no well-considered case can be found to support the instruction in the present. Where damages have been allowed for mental pain as an element of damage distinct from bodily suffering, it will be found that it was for mental agony at the time of the accident; and the authority to support that allowance is so slight that it is unsafe to follow.

Many cases will be found where language has been used seemingly warranting the instruction under consideration; but upon a careful review, it will be seen that the expressions either were purely dicta, or else were unwarranted by the facts or law given the jury, or were uttered upon the theory that something other than compensation should be recovered.

Look at the cases: (and in those before cited with those now to be, all are included which a tolerably extended examination has been able to find.) The California case has already been noticed; a similar one exists in Maryland. In response to an objection to an instruction, directing the jury in estimating plaintiff's damages to consider "the physical and mental suffering he sustained by such injury," the Court says: "There was no error in the instruction given under the plaintiff's third prayer." Only that and nothing more! And in the same opinion the section of Greenleaf just quoted is cited with approval, the Court ignoring or overlooking in its decision the word "willful." (*Stockton v. Frey*, 4 Gill. 406.)

In Pennsylvania, the instruction of the Court of Common Pleas was, that "The pain and personal affliction, incident to the injury, were to be compensated in damages"; and the Supreme Court says: "It is undoubtedly true, that in some actions for personal injuries, juries in estimating the damages are to take into consideration the personal suffering caused by the wrong." So are the decisions. In cases of libel or slander, of willful torts to the person, and in cases of negligence other than those that are breaches of contract, in cases of negligence which causes a personal injury, it

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has often been held that a jury may take into consideration the bodily and mental pain attendant on the injury. It must be admitted that it is no more possible to determine the pecuniary value of pain, in this class of cases, than in such a one as we now have before us. But such actions are not remedies sought for broken contracts. The wrongs complained of bear a nearer resemblance to a public offense. In assessing damages in such actions, juries are always allowed a larger license than in actions on contracts, and with some reason. In this State, at least, it seems to be the doctrine, that the circumstances attending such injuries may warrant an assessment of damages beyond those that are merely compensatory. It might well be, therefore, that a different rule should be applied to them from that which should be applied in suits in broken contracts. Yet it is not to be denied that the authorities recognize no such difference. In this State, the question has never directly arisen; but I know of no decision anywhere, that a passenger personally injured by the neglect of a carrier to transport him safely, has been denied compensation for the pain caused by the injury. Such compensation is denied to one who sues for injury to his relative rights; but the immediate sufferer has been held entitled to it, whenever the question has been raised. And that such is the law, is shown by the precedents. Chitty, in the second volume of his work on Pleading, page 647, gives the form of a declaration by a passenger against the owners of a stage coach for overloading and improper by driving it, whereby the coach was overturned and the plaintiff's leg was broken. In each of the Courts, the great pain of the plaintiff is laid as a substantial injury. And so far as any decisions of the English Courts are to be found upon this subject, they recognize the right of a plaintiff to damages for such a cause. In *Theobald v. The Railway Passenger Assurance Co.*, E. L. & Eq. 432, where it appeared that the defendant had undertaken to pay a reasonable compensation for any personal injury received while traveling in a railway car, it was held by the Court of Exchequer that the expense, pain and loss of the plaintiff were proper subjects, and the only proper subjects, to be considered in assessing the damages. In *Morse v. The Auburn & Syracuse R. R. Co.*, 10 Barb. 621,

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and in *Curtis v. The Rochester & Syracuse R. R. Co.*, 10 Barb. 288, it was decided that in actions against passenger carriers for negligence resulting in personal hurts, bodily pain and suffering are part and parcel of the injury, for which the injured party is as much entitled to compensation in damages as for the loss of time and the outlay of money.

These cases were reviewed by the Court of Appeals in *Ransom v. The New York & Erie R. R. Co.*, 1 Smith, 415, 15 New York, before noticed, and the doctrine asserted in them re-asserted. I do not find that it has been even doubted in any Court. Juries are required to estimate, in the best way they can, what is a just recompense for pain suffered. Though we have no decisions in this State, we have dicta of Judges sufficient to indicate the same opinion of the law.

In *Laing v. Colder*, 8 Barr. 479, which was an action against a passenger carrier for negligence, whereby the plaintiff's arm was broken whilst he was traveling in a railroad car, Judge Bell, in delivering the opinion of this Court, remarked that "injuries to the person consist in the pain suffered, bodily or mental, and in the expenses and loss of property they occasion. In estimating damages, the jury may consider not only the direct expenses incurred by the plaintiff, but the loss of his time, the bodily suffering endured, and any incurable hurt inflicted, for these may be classed among necessary results." A similar remark was made by the present Chief Justice, in *Pennsylvania R. R. Co. v. Kelly*, 7 Casey, 379. Some of these cases recognize the difficulty of applying a pecuniary balm to suffering, but deny that this furnishes any reason why it should not be done. It must therefore be considered as a rule of law, that in actions for personal injuries sustained by a passenger in consequence of the negligence of a passenger carrier, plaintiffs are entitled to recover pecuniary compensation for pain suffered, and that juries in assessing damages may consider that as an element." (*Pennsylvania R. R. Co. v. Allen*, 53 Penn. 276.)

With the final conclusion of this opinion, no fault is to be found. Such is undoubtedly the law; but all that is therein said about mental suffering as a distinct element of damages is uncalled for by the case; based upon the idea of punishment to defendant, rather

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than compensation to the plaintiff, a rule unknown to the law in actions of the kind considered; and the authorities cited do not sustain the position taken. This is evident on reading the quotation as to the citations in the English case and in those from New York. In *Laing v. Colder*, the dictum of Judge Bell is not included in the rule he lays down, which is correct; and the natural conclusion is that he did not mean to specify mental pain disconnected with physical suffering as a separate element of damage.

The remark made by Judge Woodward in 7 Casey was, that "it was proper for the jury to understand that the sufferings endured by the boy, and the disfiguration of his form, and whatever was merely personal to him, should not enter into the estimate of the father's damages, because for this the son would have a right of action." There is no doubt about the proposition, but how it serves to sustain the idea that mental suffering may be distinctively allowed for, is difficult to see.

The rule as laid down in *Laing v. Colder*, 8 Barr., is substantially the one universally followed. Probably the desire to afford full relief to plaintiff has occasioned the somewhat lax expressions which may be noticed in the cases quoted as to mental suffering. The desire is laudable, but the means suggested for its accomplishment are entirely too speculative. It is difficult to estimate by any pecuniary standard bodily pain; how much more so to weigh the sufferings of the mind, as distinct therefrom.

In the case of *Theobald v. Railway Passengers Assurance Company*, referred to in *Pennsylvania R. R. Co. v. Allen*, just quoted, Ch. B. Pollock says: "A jury most certainly have a right to give compensation for bodily suffering unintentionally inflicted; but when I was at the bar I never made a claim in respect of it, for I look on it, not so much as a means of compensating the injured person, as of damaging the opposite party."

Though unacknowledged, it is not improbable that some idea of punishment to defendants prompted the first allowance of damages for bodily suffering in cases of mere negligence, as it seems impossible to say as a bald proposition that such suffering can be compensated by money; but however the rule originated, it exists, and in these times, when traveling is so much a constituent part of

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living, it is perhaps practically well that it is so, for the pocket nerve is a very sensitive one, and prospect of heavy damages will undoubtedly do much to prevent carelessness on the part of passenger carriers. But evil must follow an attempt to introduce such a distinct element as that claimed in this case, which pertains so entirely to the sentimental, and opens the door to considerations absolutely imaginative and conjectural, dependent upon conditions and circumstances which seldom, if ever, could be brought within the proper province of a jury.

Such evil result has been produced, perhaps by this very cause in Pennsylvania, where the Legislature has enacted that no damages shall be recovered against railroad companies for personal injuries, except such as have been pecuniarily sustained, and then not to exceed three thousand dollars. Fancy damages and absurd and unjust legislation become not unnaturally correlative.

This is the first case arising in this State where it has become necessary to fix a rule of damages in actions for personal injury caused by negligence of a passenger carrier. It is well to start from the ancient landmark, and to remember that all damage to be recovered in such cases is strictly compensatory; that while it may be possible to compensate bodily pain, and so much of mental suffering as may be indivisibly connected therewith, (and this rather on authority than reason) yet that it is absolutely impossible to measure mental agony by money, and that no established rule authoritatively commands such futile attempt; and consequently it must be held that so much of the instruction given herein as allowed the jury to consider the plaintiff's pain of mind aside and distinct from his bodily suffering, was error.

As to the other portion of the instruction complained of, which directed the jury to take into consideration the plaintiff's "character," it is so entirely inapt that the word must have been inadvertently used. "The character of the parties is immaterial, except in actions for slander, seduction, or the like, when it is necessarily involved in the nature of the action." (2 Green's Ev., Sec. 269.)

As it is impossible to determine what weight these erroneous elements had in producing the sum of the verdict, it follows that it must fall, and the District Court should have granted a new trial.

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Its order denying the same and the judgment herein are reversed, and the cause remanded.

By LEWIS, C. J. :

Upon the last point discussed by my brother Whitman, I concur in reversing the judgment of the Court below.

LYON COUNTY, RESPONDENT, v. WASHOE COUNTY, APPELLANT.

TRANSFER OF ACTION BY STIPULATION. Where a cause was transferred from one judicial district to another on a stipulation, which provided that if a trial should not be had in the new district by a certain time, the cause should be transferred back to the original district, and it was so transferred back: *Held*, no error.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

This was an action to have certain territory near the northeastern corner of Storey County, claimed by Washoe County, declared to be a part of Lyon County and subject to its exclusive jurisdiction for judicial, election, taxation and other county purposes. The other cause referred to in the opinion of the Court is that of *Storey County v. Washoe County*. The mis-trials in Ormsby County resulted from disagreement of the juries. The bench was occupied by Judge Berry, of the Fifth Judicial District.

Joseph Kutz and Clarke & Wells, for Appellant.

W. H. Gates and Williams & Bixler, for Respondent.

By the Court, WHITMAN, J. :

This case with another was transferred from Humboldt County, Fifth Judicial District, to Ormsby County, Second Judicial District, under the terms of a general stipulation, on the twenty-ninth of July, 1869. It was brought on for trial twice in said Ormsby County, the last time on the tenth of January, 1870; both hearings resulting in a mis-trial. After the last, application was made upon the

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stipulation and certain other matter for re-transfer of the two cases to Humboldt County, which motion was granted.

From the order so made this appeal is taken, and the whole question of error turns on the interpretation of the portion of the stipulation as follows: "An order for such change (from Humboldt to Ormsby County) may be made on filing a stipulation to that effect with the clerk of the District Court, Fifth District, which stipulation it is hereby agreed shall be made and signed in due form. It is further stipulated, that in the event said trial does not take place on or before the first day of October next, another order shall be made changing the venue back to the Fifth District, Humboldt County, unless the time for continuance of the actions in the second district be extended by agreement and stipulation of the parties hereto." The trial did not take place on the day stated, and by verbal understanding the original time was extended until the eighteenth of the same month; and upon a mis-trial, then further extended until the tenth of January, 1870, when a hearing was had which resulted in the same manner.

It is claimed by appellant that the object and purpose of the stipulation was to secure a trial at a convenient time in Ormsby County, and that no trial has practically been had; the case, under the stipulation, remains for such trial in Ormsby County. Respondent answers that one object was to try the case in Ormsby County, but that this was guarded by the reservation that the case could at any time be taken back to Humboldt after the first day of October, unless continued in Ormsby County by agreement and stipulation, and that none such has been made.

This view would seem to be correct. The word "continuance" in the stipulation appears to be used in the sense of remaining or continuing. If so, then after the first day of October, the cause would remain or continue in Ormsby County, whether for the purpose of trial or otherwise, only by further agreement and stipulation. An agreement which was respected by the parties was made on two occasions for a temporary postponement for trial, which resulted as aforesaid; but no general agreement or stipulation for continuing the case in the Second District; and now none such exists, and in absence thereof, the order was made by the District Judge sending

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the cases to Humboldt. Under the view taken, this order was correct.

It is therefore ordered that the order appealed from be, and the same is hereby, affirmed.

By JOHNSON, J., dissenting :

This case in the lower Court stands precisely in the condition that it would had the trial occurred on or before the first of October, 1869, seeing that the parties thereto consented that such trial should be postponed to a later day, and for reasons we know not, perhaps at the instance of, and for the convenience of, the moving party ; yet, certainly the legal presumption is, that such postponement was not detrimental to either, nor for which cause, either party can here claim any advantage. Hence, neither party can upon motion be entitled to a transfer of the cause back to Humboldt County, simply because the case was not tried in Ormsby County on or before the first of October. The proceedings had in the case on the eighteenth of October, 1869, and yet later—the tenth of January, 1870—are by force of the agreement of the parties, in accordance with the terms of the stipulation, as fully performed as if these things had occurred on the preceding first of October. They had stipulated that a given day should be the limit of time when the trial should be had in Ormsby County, and the contracting parties thereafter agreed that the time should be extended, and consequently when the time originally appointed had by consent been passed over, time no longer could be considered in determining the relative jurisdiction of Ormsby and Humboldt Counties. Thereafter, in my judgment, the case could not be taken from Ormsby County except for statutory causes, none of which are shown.

In support of these conclusions, I refer to the several stipulations of the parties as appear in the record as follows: “In the above entitled actions the parties by their counsel stipulate as follows :

I. That the venue of the two first above named actions shall be changed to the County of Ormsby, Second Judicial District, provided either Judge George G. Berry or Wm. H. Beatty will agree

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to preside at the trial hereinafter mentioned, and at a time fixed not later than the first day of October, next. That an order for such change may be made on filing a stipulation to that effect with the clerk of the District Court, Fifth District, which stipulation it is hereby agreed shall be made and signed in due form. It is further stipulated that in the event said trial does not take place on or before the first day of October, next, another order shall be made changing the venue back to the Fifth District, Humboldt County, unless the time for continuance of the actions in the Second District be extended by agreement and stipulation of the parties hereto."

"The parties in the above entitled action hereby stipulate that an order may be entered changing the place of trial of said action to the Second District Court, Ormsby County, State aforesaid, and that the clerk of the above entitled Court transmit all the original papers in said action with a copy of the order above named to the clerk of the District Court of the Second District." That by verbal understanding of the parties, the action was postponed from time to time, until the eighteenth day of October, A.D. 1869, when a trial was commenced and ended by disagreement of the jury. The latter jury having been discharged, and no judgment entered, the Court upon the facts aforesaid granted plaintiffs' motion for change of the place of trial of said action, and made an order accordingly. I think the order of the Court below ordering the case back to Humboldt County for trial was unauthorized, and therefore I must dissent from the judgment pronounced by my associates of the Court.

E. D. BROWN *et al.*, RESPONDENTS, v. LOUIS LILLIE,
APPELLANT.

FIXTURES—WHAT CANNOT BE. A thing which is neither attached to the realty, nor placed upon the land with a view to making it permanent, nor essential to the full and complete enjoyment of the freehold, cannot become a fixture in any sense of the word.

A FIXTURE MUST BE CONNECTED WITH THE FREEHOLD. Connection with or annexation to the freehold in some way is indispensable, as a general rule, to constitute a fixture.

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INTENTION OF BUILDER AS TO FIXTURE. The cases holding that the intention of the person making the annexation to real estate must determine whether the thing annexed be a fixture or not, are overborne by the great weight of authority the other way.

CHATELS NOT FIXTURES HAVE NO CHARACTER OF REALTY. A personal chattel cannot be converted into real estate or given the character of realty, except by making it a fixture; and if not so attached to real estate as to become a fixture, it retains its character of personalty, entirely unmodified and unaffected by its situation.

SAW MILL—WHEN NOT A FIXTURE. A saw mill built upon timbers lying upon the surface of the ground and constructed with the object and purpose, after sawing the timber within a convenient distance, to be removed to another locality, is a mere personal chattel, and will not pass by a conveyance or patent of the land.

ERROR WITHOUT PREJUDICE. If upon admitted or undisputed facts a verdict for plaintiff upon a question of title to property could not legally have been against him, it cannot be said that the admission of illegal evidence upon the same point, or the refusal of the Court to instruct the jury to disregard it, could have prejudiced the defendant.

INSTRUCTION INAPPLICABLE TO ISSUE. A judgment will not be reversed on account of an erroneous instruction, when it appears that it was not applicable to the issues and could not have injured.

APPEAL from the District Court of the First Judicial District, Storey County.

Brown & Eager, the plaintiffs, being the owners of a saw mill known as the Eagle Mill, in Washoe County, about October 1st, 1869, employed the defendant to sell it and dispose of the proceeds as stated in the opinion. Defendant sold the property, and as a portion of the price received promissory notes to the amount of three thousand dollars, which he refused to account for. The prayer of the complaint was for a delivery of the notes, or judgment for the amount of them, in case a delivery could not be had.

The defendant, in the latter part of 1868, acquired a patent from the State for the land on which the mill was situated; and he claimed to have thereby become the owner of the mill as a fixture, and that his sale of it was for his own use and benefit. Defendant, in addition to the foregoing defense, also set up the statute of frauds as against any agreement of his to dispose of the mill as plaintiffs' agent, or account for the proceeds.

There was a verdict for plaintiffs; and in accordance therewith the judgment was for the recovery of the possession of the notes,

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or in case a delivery thereof could not be had, for the sum of two thousand two hundred and fifty dollars, it appearing the notes were not yet due, and that defendant had expended several hundred dollars in taking care of the property.

Mitchell & Stone, for Appellant.

I. There was no consideration moving to defendant for the agreement to take possession of the mill property and sell the same. At the time such agreement was made, he had the title to the property which he agreed to sell, and apply the proceeds to the payment of himself, the Bank of California, and whatever remained to plaintiffs. He took upon himself the performance of a mere voluntary act; which, being without any consideration, was void.

II. The mill had every element of a fixture. (*Prescott & Booth v. Wells, Fargo & Co.*, 3 Nevada, 90; *Merritt v. Judd*, 14 Cal. 59; *Walker v. Sherman*, 20 Wend. 638; *Gray v. Holdship*, 17 Serg. & Rawle, 413; *Morgan v. Arthur*, 3 Watts, 140; *Lenear v. Miles*, 4 Watts, 330.)

III. Assuming that defendant was the agent of plaintiffs to sell the mill, there is no proof that the proceeds were converted by him. There can be no conversion of goods by an agent or factor when he is authorized to sell them to reimburse himself for his advances. If he was an agent at all, he occupied the position of a factor, having the title to the property with the power of absolute disposition of the same, to repay himself his commissions and disbursements. No action could be maintained against him until the satisfaction and discharge of his lien upon the property therefor.

Hillyer, Wood & Deal for Respondents.

I. The mill was not a fixture. (*Van Ness v. Packard*, 2 Peters, 137; *Teaff v. Hewitt*, 1 Ohio S. R. 530.)

II. If we are correct in the statement that this is a mere question of the sale of chattels by an agent for his principal, this Court will not pass upon the correctness of the instruction as to fixtures.

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(*Enwright v. S. F. & S. J. R. R. Co.*, 33 Cal. 230; *Mills v. Barry*, 22 Cal. 240; *Kidd v. Temple*, 22 Cal. 255; *Robinson v. Imperial S. M. Co.*, 5 Nev. 44.)

III. The defendant's instructions in relation to consideration were properly refused. They had no applicability whatever to the case. Where a consideration for an agreement is shown, Courts only inquire whether it is a valuable consideration, and not whether it is adequate. (1 Parsons on Contracts, 362.)

By the Court, LEWIS, C. J. :

It was a rule of the common law, that whenever an article of personal property was annexed or attached to the land it became a part of the freehold, and belonged to the owner of the latter. The property thus changed in its character by annexation to the soil, was called a fixture, and followed the realty by conveyance and descent. This is even now the general rule, but exceptions have been engrafted upon it by the Courts in favor of trade, and of certain individuals. Thus it is now the universal rule of decisions that things attached to the land by a tenant, for the purpose of trade or ornament, or for his own domestic use, may be removed; so be it he does it whilst his interest in the estate continues; that is, during his term. However, it is not important for the purpose of this decision to determine what may be considered trade, ornamental or removable fixtures, but only to ascertain whether that can become a fixture in any sense of the word which is neither attached to the realty, placed upon the land with a view to making it permanent, nor essential to the full and complete enjoyment of the freehold.

We will endeavor to show that it cannot, and that when all these elements are wanting, the thing, whether it be a mill or a dwelling house, or any other character of improvement, is mere personal property, like any other chattel, entirely unaffected by its location or situation, removable from the land and governed by all the rules regulating purely personal property. We will not claim that decisions cannot be found in opposition to our views and conclusions; for there is probably no subject in the law involved in more ir-

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reconcilable confusion, or more subtle refinements, than this question—of fixtures. Our conclusions, nevertheless, are maintained, if not by all the decided cases, yet by such as deserve the highest consideration, and by what is still better, the reason and good sense of the law.

What then is a fixture? Kent defines it to be an article of personal nature affixed to the freehold. (2 Cow. 344.) Judge Cowen in *Walker v. Sherman*, 20 Wend., upon an elaborate review of the cases observes: "But it would be a solecism to call them fixtures where they are not strictly or commonly attached even by bands or hooks to any part of the realty. The word fixture is derived from the thing signified by its being fastened or fixed." Again, after speaking of things which may be constructively annexed, and which we will notice hereafter, the author, in Smith's Leading Cases, says: "Setting these cases of constructive annexation, which are comparatively unimportant, and on which few practical questions arise, completely out of view, the general rule is that to constitute an article a fixture, i. e. part of the realty, it must be actually annexed thereto." (Page 238.) "By the expression, annexed to the freehold, is meant fastened to, or connected with it." (Page 239.) See also (*Merritt v. Judd*, 14 Cal. 59.)

In *Hill v. Wentworth*, 29 Vermont, 429, the Supreme Court of Vermont observes: "From the cases already decided in this State, upon a subject which from its very nature is perplexing, and rendered more so by the conflicting views of different Courts, it is quite evident our Courts have assumed the ground that a chattel is not to lose its personal identity as such, unless it has been substantially annexed to the freehold, in a manner which would not permit it to be separated from it, without material injury to itself or to the freehold. We apprehend there is no sufficient reason why we should, at the present day, recede from the ground already taken by our Courts. It is certainly sustained by many well considered cases."

"Fixtures," says Taylor: "are chattels or articles of a personal nature, which have been affixed to the land in such a manner as to constitute a part of the realty to which they adhere, and do therefore partake of its incidents and properties." (Landlord and Ten-

ant, 544.) "If there be anything well settled," say the Supreme Court of Ohio: "in the doctrine of fixtures, it is this: that to constitute a fixture, it is an essential requisite that the article be actually affixed or annexed to the realty. The term itself imports this." (*Teaff v. Hewitt*, 1 Ohio State Rep. 511.) *Amos and Ferard*, (page 2) say: "It is necessary in order to constitute a fixture that the article should be let into or united with the land, or to substance previously connected therewith." In Dane's abridgement (Vol. 3, p. 156) it is said: "It is very difficult to extract from all the cases as to fixtures, in the books, any one principle on which they have been decided, though being fixed or fastened to the soil, house or freehold seems to have been the leading one in some cases, yet not the only one." The great weight of authority, say the Supreme Court of Connecticut, in *Copen v. Peckham*, "is in favor of the doctrine that to constitute a fixture it is necessary that the article should be annexed to the freehold, as the name itself imports." (35 Conn. 98.)

Connection with or annexation to the freehold in some way is indeed held to be indispensable by almost the unbroken current of authorities. Nothing less is deemed sufficient, although more is required by many very well considered cases. Thus in the case of *The Dispatch Line v. Bellamy*, 12 N. H., the Court expressed the opinion that actual annexation to the freehold and *adaptation to its purposes* must unite in order to render personal property incident and appurtenant to the realty. So Mr. Dane remarks, in speaking of this question: "Not the mere fixing or fastening is alone to be regarded, but the use, nature and intention." (Abridgement, Vol. 3, p. 156.) So in the case of *Teaff v. Hewitt*, *supra*, the Court laid down the rule, that there must be the "united application of the following requirements: 1st, Actual annexation to the realty or something appurtenant thereto. 2d, Appropriation to the use or purpose of that part of the realty with which it is connected. 3d, The intention of the party making the annexation, to make the article a permanent accession to the freehold—this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, the structure and mode of annexation, and the purpose and use for which the annexation has been made."

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It is true, there are a few cases wherein it is held that the intuition of the person making the annexation must determine whether the thing be a fixture or not; but they are overborne by the great weight of decisions, and are not recognized as law out of the States whose courts have rendered them.

There are, as we stated in the outset, exceptions to this general rule requiring actual annexation, which is recognized by all the courts. The articles not embraced in the general rule, however, are very few, and are held to be constructively annexed, or are of that class of articles which, although moveable and purely personal property in themselves, yet form a part of or are essential to the completion of something which is actually fastened to the soil. As articles embraced in this class may be mentioned: the doors, windows, locks, keys, rings of a house, and an ordinary Virginia rail fence. But it must be borne in mind that the courts holding these peculiar articles to be fixtures, or a part of the realty, do not in so ruling deny the general rule, requiring actual annexation, but only hold that articles of the character mentioned are excepted out of it.

We do not wish to be understood as indorsing these authorities, except so far as they hold that actual annexation to the soil is necessary. All the cases deserving consideration certainly make that an essential requisite, whilst others not only require an actual annexation but something in addition thereto.

What, then, is the condition of that property which is not in any manner or in any sense of the word annexed to the soil? If we understand the law, it certainly cannot be considered a fixture or realty, unless it be of that class embraced within the exceptions to the rule. Is there any reason or rule of law which in any wise modifies the character of buildings or structures so placed on land as not to become fixtures, that they cannot be governed by the rules controlling purely personal property? If a building or any thing else placed on land by the act of man be not a fixture, either removable or otherwise, what is its character or what position does it occupy in the classifications of property? Unquestionably it is purely, simply and unqualifiedly personal property. To hold a thing to be a chattel personal, and still make it subject to a rule applicable only to a fixture, as courts have done in some cases, is a

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practice without the semblance of law to sanction it. We know of no method of converting a personal chattel into real estate, or giving it the character of realty, except by making it a fixture; and if it be not so attached as to become a fixture, it retains its character of personalty entirely unmodified or affected by its situation.

That an erection of any kind placed on the land, but not annexed or fastened to, or imbedded in the soil, and not intended to be permanent or left indefinitely thereon, cannot be deemed a fixture, is a proposition we think fully warranted by almost the entire weight of decisions; and if not a fixture, we are authorized in concluding that it is a personal chattel merely, and must be regulated by the law governing that class of property.

If these conclusions be correct, the saw mill in question in this case was clearly not a fixture. Eager, testifying to the character of the building, said: "The Eagle Mill originally cost in its construction about twelve thousand dollars. It was built upon large timbers placed upon the ground. Upon these timbers brick work was constructed, and the engine, boiler and machinery attached to it. There was no grading done in laying the foundation of the mill building, except at the upper corner, which was graded. The mill building was constructed as ordinary saw mills are constructed, and was a substantial building. It was constructed for the purpose of sawing the timber within a convenient distance, and then to be removed to some other locality where there was timber to saw." The evidence in the record before us is undisputed that the mill simply rested on the surface of the ground, and was intended to be removed whenever the timber in its vicinity was manufactured.

Here, then, there was neither annexation to the soil, nor the intention to make the building a permanent structure on the land. It was therefore a mere personal chattel, in no wise affected by its situation on the land, not being a part of the realty. That it would not pass by a conveyance or patent of the land is too manifest to require argument, for the general rule, and one well settled, is that any personal chattel cannot be considered as an incident to the land, even as between vendor and vendee, so as to pass by a conveyance of the realty; and so it has been repeatedly held in

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cases where the question arose upon facts very similar to those of this case. (See *Peck v. Brown*, 5 Nev. 81.) As an exception to this rule may be mentioned growing crops, which although deemed mere personal chattels, still pass to the vendee by conveyance of the land. Others might be mentioned; but with the exceptions we have nothing to do, for it cannot be claimed that this case comes within them. The patent of the land then obtained by the defendant did not affect the title to or property in the mill; that remained in Brown and Eager as would the property in any article of personal nature which the defendants may have found on the premises. This conclusion respecting the character of the mill and the title to it will enable us very readily to dispose of the various points made by counsel for appellant in favor of a reversal of the judgment; and that they may be clearly understood, it will be well to state a few of the leading facts bearing upon them as they are presented by the record.

About the time of procuring the patent, or very shortly afterward, it was testified by Eager that an agreement between him and Lillie was entered into, wherein he, Lillie, was to take possession of the mill with its machinery, and sell it for such reasonable price as he could obtain, he to retain a certain sum out of the money so obtained in payment of a debt due him by Brown and Eager, to pay about two thousand dollars of indebtedness, which they were owing the Bank of California, and pay the balance to the plaintiffs. It is admitted that the defendant took possession of the mill, sold it for three thousand dollars, and that he has paid nothing either to the Bank or the plaintiffs, but retains the entire sum.

It is claimed, 1st, that the verdict is contrary to the evidence, because it is proven and not disputed that Lillie acquired the title to the land upon which the Eagle Mill was situated by patent from the State, from which it is argued the defendant became the owner of the mill and machinery; and such being the case, the verdict could not properly be in favor of plaintiffs. But we have shown that the mill and machinery did not pass to the patentee, but remained the property of the plaintiffs; and this is a sufficient answer to the first point.

2nd. It is said there was no consideration for the contract

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between Eager and the defendant, respecting the sale of the mill by the latter. This point also is doubtless based upon the assumption that the mill and machinery were conveyed to Lillie by the patent. As, however, the plaintiffs were the owners at the time of the contract, and as the agreement is executed to the extent of the sale by Lillie, it will hardly be insisted that the want of consideration can be relied on by Lillie as a defense to the recovery of the money obtained by him for the plaintiffs' property.

3rd. The instructions asked by the defendant, to the effect that any parol contract entered into between plaintiffs and defendants, whereby the latter agreed to procure title from the State to the land on which the mill in question was situated, for the benefit of the plaintiffs, was void by the statute of frauds, should perhaps have been given; as some evidence was admitted to establish such agreement between the parties. No question respecting the title to the land being in the case, the only tendency of the testimony so admitted was to make out or strengthen the plaintiffs' property in the mill and machinery. The evidence on that point was perhaps irrelevant, but being admitted, the instructions referred to were asked for the evident purpose of precluding the jury from finding the title to the mill and machinery to be the plaintiffs' upon such evidence. But if the defendant acquired no right to the mill or machinery by the patent, (and he claims it by no other title) then the jury were bound to find the plaintiffs to be the owners, notwithstanding the defendant may have acquired the absolute title to the land by means of the patent. Upon undisputed and admitted facts, the property in the mill and machinery is shown to be in the plaintiffs, independent of the title to the land. Had the jury found otherwise, it would be the duty of the Court to set aside the verdict. The conclusion is, that the defendant could not have been prejudiced by the evidence, showing the agreement to procure title to the land for the plaintiffs, nor by the refusal to give the instructions respecting such agreement. If upon admitted or undisputed facts, the verdict upon the question of title to the mill could not legally be against the plaintiffs, it cannot be said that the admission of illegal evidence upon the same point, or the refusal of the Court to instruct the jury to disregard it when admitted, could

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- prejudice the defendant. And if not prejudicial to him, it will not justify a reversal of the verdict or judgment. (See *Fleeson v. Savage Silver Mining Co.*, 3 Nev. 162.) The judgment upon this ground cannot therefore be reversed.

4th. It is also complained that the Court erred in instructing the jury, thus: "A saw mill erected by a person about to engage in the lumber business upon the public lands of the United States, for the purpose of manufacturing lumber, and not with the intention of making a permanent improvement of the land, and of such a character that the same may, without injury to the soil on which it is placed, be removed to another locality and there made available for a similar purpose, is not a fixture which can be held as realty by a subsequent purchaser from the Government, as against the builder of the mill desiring to remove or dispose of the same. The mill in such case is personal property, and belongs to the person who erected it." As applied to the facts of this case, we think we have shown this instruction to be correct, and hence properly given.

5th. Again, it is claimed the Court erred in giving an instruction to the effect that if the jury believed from the evidence that the promissory notes described in the complaint were the property of the plaintiffs, and that they by their attorneys, prior to the commencement of this action, made demand on defendant for said notes, and that prior to said demand, defendant had wrongfully converted the notes to his own use, "then the jury are instructed that defendant, by such conversion, lost any lien he had upon them, for advances made by him for plaintiffs." This instruction is upon a question in no wise in the case. There is no claim by the defendant that he had a lien on the notes referred to. His only defense is that they belong to him—were his own property. Hence the instruction was simply impertinent to the issues. If the defendant did not claim a lien upon the notes, surely an instruction that under the circumstances mentioned in the instruction he had lost it, could not prejudice his rights in this action. Under his pleading in this case, he would not be allowed to rely on the defense of a lien upon the notes, nor could the jury properly find in his favor on that ground. The instruction is therefore simply not applicable to the issues, and could not possibly have injured him. Hence, even if

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incorrectly stating the law, it is not such error as to warrant a reversal. (*Shorter v. The People*, 2 Comstock, 193.)

This disposes of all the points argued by appellant, and as we find them untenable, the judgment must be affirmed.

It is so ordered.

REPORTS OF CASES
DETERMINED IN THE
S U P R E M E C O U R T
OF THE
STATE OF NEVADA,
JANUARY TERM, 1871.

**THE STATE OF NEVADA, RESPONDENT, v. WILLIAM
CHAMBERLAIN, APPELLANT.**

VENUE MATERIAL IN INDICTMENTS. An allegation of the county wherein a crime was committed is as material in an indictment as any fact constituting the body of the offense.

STATUTORY FORM OF INDICTMENT DEFECTIVE. The form of an indictment given in the statute of 1867, (Stats. 1867, 126) is insufficient in so far as it omits the venue.

CONSTRUCTION OF STATUTE CONTAINING FORM OF INDICTMENT. The section of the criminal statute giving the form of an indictment and omitting the venue therefrom (Stats. 1867, 126) is controlled by the next section, which requires a statement of all essential facts.

OMISSION OF VENUE IN INDICTMENT NOT AMENDABLE. An indictment which omits to state the venue cannot be amended in that respect.

MEANING OF "INDICTMENT OF A GRAND JURY" IN CONSTITUTION. Where an indictment, which omitted the essential allegation of venue, was amended in that respect: *Held*, that it was no longer an "indictment of a grand jury," within the meaning of Art. I, Sec. 8, of the Constitution.

AMENDMENT OF INDICTMENT. A Court has no more power to add any material charge, accusation or allegation to an indictment, than it has to find a bill in the first instance.

The State of Nevada v. Chamberlain.

APPEAL from the District Court of the Eleventh Judicial District, Elko County.

The original indictment in this case was as follows :

“ STATE OF NEVADA, }
County of Elko, } ss.

To the District Court of the Eleventh Judicial District.

THE STATE OF NEVADA, Plaintiff, }
v. }
WILLIAM CHAMBERLAIN, Defendant. }

The said defendant, William Chamberlain, is accused by the grand jury of the County of Elko, State of Nevada, of the crime of murder, committed as follows :

The said William Chamberlain on the sixth day of July, A.D. 1869, without authority of law, and with malice aforethought, killed one James Bender, by shooting him with a rifle.

WM. M. GILLESPIE,

District Attorney of said County.

Per Daniel E. Waldron,

Deputy District Attorney for said County.”

Endorsed : “ The State of Nevada v. William Chamberlain, for murder, first degree. Names of witnesses : Robert Wood, Edward Lamb, J. F. Newman. A true bill. Frank Denver, Foreman Grand Jury. Filed in open Court, August 18th, 1869. T. A. Waterman, Clerk.”

The amendment consisted in inserting, after the figures “ 1869,” and before “ without,” in the body of the indictment, the words : “ In the County of Elko, State aforesaid.”

Pitzer & Flack, for Appellant.

[No brief on file.]

L. A. Buckner, Attorney General, for Respondent.

I. The original indictment was sufficient, because it followed the form laid down in the statute. If the Legislature had the right to determine and direct the method of procedure in criminal cases, it follows, as a logical sequence, that when it acted its legis-

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lation on the subject was decisive. (*State v. Millain*, 3 Nev. 409; *State v. Anderson*, 4 Nev. 265.)

II. The State had a right to amend, and was not limited to mere matter of form. The character of the charge was not changed. *It was still for murder*. Defendant was not prejudiced in the merits of his defense.

III. It is not necessary to state any venue in the body of the indictment, but the county, city or other jurisdiction named in the margin thereof shall be taken to be the venue of all the facts in the body of the indictment. The State and county appear on the face of this indictment. (1 Bishop's Crim. Procedure, Sec. 91; *State v. Millain*, 3 Nev. 409; *State v. Anderson*, 4 Nev. 265.)

IV. An amendment under the Criminal Practice Act has no similarity to the civil—in the latter the amended pleading substitutes the original, but under the former the only result on the defendant is that it may work an adjournment. It is the same pleading, if it does not alter the character of the charge. To require the amendment to be found would be to deny to the Legislature the power to provide for amendments.

By the Court, LEWIS, C. J.:

The defendant was indicted by the Grand Jury of the county of Elko, for the crime of murder. The indictment found and presented by them containing no allegation to the venue or locality of the crime, a motion was made before the District Court for leave to amend it in that particular, which being allowed, the addition was made and the defendant arraigned and put upon his trial, convicted of murder in the second degree and sentenced in accordance with law. Upon this appeal it is claimed the Court below erred in allowing the amendment, and in trying the defendant upon the indictment so amended.

This point we think well taken. An allegation of the county wherein a crime is committed is manifestly material, as much so as any fact constituting the body of the offense itself. It has always been held necessary by the Courts, and indictments have invariably been held insufficient which did not in some way state the locality of the crime.

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It was thought necessary at common law to state the particular town, neighborhood, village or parish, wherein the offense was committed; now, however, no designation of the place except the county is required, but that is indispensable. True, the statute (Stats. 1867, 126) prescribes a form from which the venue seems to be omitted, but it will be observed the section following that prescribing the form requires the statement of all essential facts. This last section we think should control the mere form set out in the prior section. Such allegation being a material and essential part of the indictment, it is clear the Court could not amend it by the addition of such allegation, for the obvious reason that the Constitution of this State (Art. I, Sec. 8) prohibits the trial of any person for a "capital or other infamous crime * * * except on presentment or indictment of a grand jury."

There can be no difference of opinion as to what is meant by the expression "indictment of a grand jury." It manifestly means a written accusation made and presented by the inquisition known as a grand jury. But if, after being presented to the court, an indictment so found be in any particular materially modified or altered; if anything of substance be added to or taken therefrom by the Court, it cannot with any degree of propriety be denominated an indictment of a *grand jury*. If, as in this case, something material be added to it, the portion so added would not be a finding or accusation by the jury, but by the Court; nor if modified in any essential matter would the portion so modified be their work.

If the Courts have the power to add to or take from anything material in an indictment, where is the limit to that power? If one can arrogate to itself any portion, upon what rule could it be held that it should not take upon itself the entire duties of the grand jury? Clearly no indictment upon which a person can be legally tried can be found except by a grand jury, and the Courts have no more authority to add any material charge, accusation or allegation to it than they have to find the bill in the first instance.

The judgment must be reversed; and as the original indictment is radically defective, the Court below will submit this case to another grand jury.

It is so ordered.

MEADOW VALLEY MINING COMPANY *et al.*, RESPONDENTS, v. ELLIOTT DODDS *et als.*, APPELLANTS.

ORDER REQUIRING BOND OR APPOINTING RECEIVER NOT APPEALABLE. The statute (Practice Act, Sec. 380) does not allow an appeal from an order requiring a party to give a bond, nor from an order appointing a receiver.

ORDER APPEALABLE ONLY IN PART. Where, upon a rule to show cause why an injunction should not issue, an order was made that defendants, in consideration of their retaining control of the premises in controversy, should give a bond to pay all damages that plaintiff might sustain; that in default thereof, a receiver should be appointed; and that defendants might make improvements, but not remove any improvements already made, nor commit waste: *Held*, that if the order was appealable at all, it was only in so far as it placed an injunction upon defendants.

RELIEF ON APPEAL FROM ORDER APPEALABLE ONLY IN PART. Where an order granting an injunction embraced a further order, entirely independent of the injunction, to the effect that one party should execute a bond for the protection or security of the other: *Held*, on appeal therefrom, that the entertainment by the appellate Court of the portion of the order which was appealable would not warrant a review of the other portion which was not appealable.

ORDER EMBRACING DISTINCT AND INDEPENDENT ORDERS. Where an order embraces matters really independent and distinct, the mere fact that they are so embraced or made at the same time and written on the same paper, does not make them one and the same order.

ASSIGNMENT OR SPECIFICATIONS OF ERRORS ON APPEAL. Where on appeal from an order, appellant brought up a statement of the evidence heard and proceedings had, claiming that it exhibited various errors of the Court, and showed that plaintiff failed to make out a case, but without pointing out the particular errors or failure: *Held*, that as there was no assignment or specification of such alleged errors, they could not be reviewed by the appellate Court.

SUFFICIENCY OF COMPLAINT FOR INJUNCTION TO STAY WASTE. Where a complaint alleged that plaintiff was the owner and entitled to the possession of lands, that there were improvements thereon, that defendants were in possession and threatened to destroy and would if not enjoined destroy such improvements, and that defendants were insolvent and unable to respond in damages: *Held*, sufficient to support an order enjoining defendants from removing the improvements or committing waste.

INTENDMENTS IN FAVOR OF COMPLAINT AFTER JUDGMENT. After a verdict or decision in a District Court upon issue joined, the complaint will be supported by every legal intendment, if there be nothing material in the record to prevent it.

INTENDMENTS IN FAVOR OF COMPLAINT AFTER ORDER BASED UPON IT. The rule that carries every legal intendment in favor of a complaint in case there has been a judgment thereon after issue joined, equally applies in case of an order, such as an injunction, made upon it after a full hearing.

Meadow Valley Mining Company v. Dodds.

APPEAL from the District Court of the Ninth Judicial District, Lincoln County.

This was an action by the Meadow Valley Mining Company, John H. Ely and W. H. Raymond, against Elliott Dodds, William Dodds, Frank Dodds, Thomas Dodds and other parties unknown, to recover restitution of the "Floral Spring Ranch" in Highland District, Lincoln County, and damages for the loss of the rents and profits thereof; and also for an injunction to restrain defendants from further interfering with or taking away the valuable waters of the springs upon said ranch, and from destroying the improvements thereon.

The statement on appeal was a narrative of the proceedings before the Judge below upon the order to show cause why an injunction should not issue. It set forth that documentary evidence and oral testimony were introduced, giving the documents in full and the testimony in substance; and also setting forth the various objections made, the rulings of the Court, and the exceptions of appellants; but not pointing out particularly what would be relied on as error.

Ellis & King, for Appellants.

H. I. Thornton and *Wm. W. Bishop*, for Respondents.

By the Court, LEWIS, C. J.:

This appeal is from the following order made by the Court below before trial, upon a rule to show cause why an injunction should not issue against the appellants: "It is ordered and adjudged that the defendants give to the plaintiff a good and sufficient bond in the sum of five thousand dollars gold coin, to be approved by the Court, conditioned that said defendants shall, in consideration of retaining possession and control of the premises and water in the complaint described, during the pendency of this action, pay the plaintiff such sum of money for their damages and costs as it may sustain by reason of the acts of defendants, should the plaintiff finally recover in this action. It is further ordered that in case said bond shall not be filed with the clerk of this Court on the fifth day of November, A. D.-1870, at one o'clock P. M., that then a receiver will be ap-

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pointed by the Court to take charge of the property in dispute and sell the water at the same. It is also ordered that the defendants may, during the time before this cause shall come on for trial, make such improvements upon said property as they desire to make, but they shall not remove any improvements therefrom or commit any waste thereon."

The first question naturally suggesting itself upon this appeal is whether this rather unusual order is one of those from which an appeal is allowed. Section three hundred and thirty of the Code of Procedure designates all the decisions or orders from which an appeal may be taken: First, it is allowed from "a final judgment in an action or special proceeding commenced in the Court in which the judgment is rendered; second, from a judgment rendered on an appeal from an inferior Court; third, from an order granting or refusing a new trial, from an order granting or dissolving an injunction, and from any special order made after final judgment; fourth, from an interlocutory judgment or order in cases of partition which determines the rights of the several parties, and directs partition, sale, or division to be made.

It is apparent at a glance that this order is not embraced in this section, unless the latter portion of it, whereby the defendants are prohibited from removing improvements and committing waste can be called an injunction. Possibly it may be so; at least we will so consider it for the purposes of this appeal. It must be borne in mind, however, that nothing in the order quoted can be reviewed on this appeal, except that portion which may be designated an injunction. As the statute does not allow an appeal from an order requiring a party litigant to give a bond as is done here, nor an order appointing a receiver, it is evident that it was not intended to permit a review of the action of the lower Court in matters of that kind, except upon an appeal from the final judgment. If an order granting an injunction also embrace, as in this case, a further order or requirement entirely independent of the injunction, that a party execute a bond for the protection or security of the other, we do not see that an appeal from that portion of the order which is appealable will warrant a review of another portion which is not, and which, although embraced in the same order, is really independent

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and distinct in itself. That they were made at the same time or written on the same paper does not make them one and the same order. That may be, and still the orders be as distinct and independent as if made at different times and reflecting different subjects.

It must be determined from the body and subject matter of the mandate of the Court whether it embraced more than one order. The order requiring the defendant to give a bond in the sum of five thousand dollars, as security to the plaintiff in case it recover judgment, is in no way dependent upon or connected with the injunction placed upon the defendants in the conclusion of the order, and it is only by treating that as an injunction order that this case can be held to be before this Court at all.

The appellant brings up a statement of evidence and the proceedings had at the hearing upon the order to show cause, claiming that it exhibits many errors committed by the Court below, and also that it shows that plaintiff failed to make out a case on the merits entitling him to relief. None of these points, however, can be reviewed here, for the reason that the statement, if it may be so called, contains no assignment or specification of the errors to be ruled on. (See *Corbett v. Job*, 5 Nev. 201; Practice Act, Sec. 382.)

It only remains to be determined, then, whether the complaint warrants or will support an order enjoining the defendants from removing improvements or committing waste on the premises in dispute pending the trial. That pleading is perhaps not entirely formal or complete, but it seems to contain sufficient to sustain the order. We may conclude from it that there are improvements of some kind on the demanded premises; that the defendants are in possession; that they threaten to destroy, and will if not enjoined destroy such improvements, and that they are insolvent and unable to respond in damages. Taken entire, we are inclined to think the complaint sufficient, if not on demurrer, at least after joinder of issue, the introduction of evidence and granting of the order, for the same rule whereby the sufficiency of a pleading is tested after judgment equally applies after an order of this kind made upon a full hearing. That rule, it will be remembered, is that after verdict or decision in

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an action, when issue is joined, the Courts will support the pleading by every legal intendment, if there be nothing material in the record to prevent it.

It follows that the injunction must be affirmed. It is so ordered.

GABBER, J., did not participate in the foregoing decision.

HENRY L. CAPLES, RESPONDENT, v. THE CENTRAL PACIFIC RAILROAD COMPANY, APPELLANT.

SERVICE OF SUMMONS UPON CALIFORNIA COMPANY. Service of summons upon a California corporation, made in accordance with Sec. 29 of the Practice Act, is valid.

NO REVERSAL FOR ERROR WHICH DOES NOT PREJUDICE. No error is noticeable or deemed material which did not or could not prejudice the rights of the party complaining.

SERVICE OF SUMMONS AFTER INSUFFICIENT ATTEMPTED SERVICE. Where an attempted service of summons upon a California corporation was made in this State, and a subsequent service in California, under the provisions of Sec. 29 of the Practice Act: *Held*, that it made no difference whether an order refusing to quash the first service was correct or not, it appearing that the second service was good, and no prejudice done.

COSTS ON MOTIONS. It is within the power of a court to permit the costs of motions made during the progress of the trial, such as to quash the service of summons, &c., to abide the event of the suit; there being no statute or rule of practice requiring the costs of such motions to be taxed against the losing party.

TRANSFER OF ACTIONS TO UNITED STATES COURTS. Where a motion was made to transfer a suit brought against a citizen of California to the United States Court on the ground that the plaintiff was a citizen of this State; and on counter affidavits showing plaintiff to be a citizen of Missouri, the motion was denied: *Held*, no error.

TRANSCRIPT NOT CONTAINING ALL THE EVIDENCE. An objection that the evidence is insufficient to support the judgment is unavailable on appeal, if the transcript does not purport to contain all the evidence on the point; it requiring an affirmative showing to rebut the presumption that all facts necessary to support the judgment were sufficiently proved.

JUDGE'S CERTIFICATE TO STATEMENT ON APPEAL. The Practice Act (Secs. 197 and 335) does not contemplate that the judge shall certify that a statement on appeal contains all the evidence, but simply that it has been allowed by him and is correct.

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ADDITIONS TO JUDGE'S CERTIFICATE TO STATEMENT. A judge's certificate to a statement on motion for new trial and appeal that the record contains all the evidence, will not be allowed to be added after the appeal has been perfected and the transcript become a record of the appellate court.

WHOLE CHARGE TO JURY TO BE CONSIDERED AS ENTIRETY. In determining whether an instruction or portion of a charge is erroneous or calculated to mislead the jury, the whole charge must be taken together and considered as an entirety; and if anything essential, omitted from the instruction or portion of charge, be found in another instruction or portion of charge, the omission will not be fatal.

ENFORCEMENT OF RULES OF COURT. Courts have power to adopt rules not in conflict with law; and when they have done so and the rules are reasonable, as appellate court will not interfere with their enforcement.

NOTICE OF MOTION TO RETAX COSTS. Where a rule of court required notice of motion to retax costs to be served within two days after the filing of the cost bill: *Held*, that it was no error to refuse to hear a motion to retax costs, when such notice had not been served.

DISCRETION OF COURTS AS TO THEIR RULES. Courts have a reasonable discretion in allowing or not allowing the requirements of their rules to be waived.

APPEAL from the District Court of the Eleventh Judicial District, Elko County.

The plaintiff was injured by a collision of cars on the Central Pacific Railroad at a point near Toano, in March, 1869, his skull being fractured, and being otherwise wounded and lamed. He obtained a verdict and judgment for the sum of eight thousand dollars in gold coin. His costs were taxed at the sum of nine hundred and ninety-eight dollars and thirty-five cents.

Robert Robinson and Earll J. Smith, for Appellant.

I. If the first service was good, the second is a nullity. The question for this Court to pass upon is the regularity of the first service, for upon that we were ordered to trial.

II. As to whether the statement shows that there was other and sufficient evidence to justify the verdict, we are not disposed to discuss the opinion of this Court in the case of *Sherwood v. Siss*; we are not unmindful of the fact that the question is there put at rest; but we imagine the rule does not require the statement to show in *words written* that it contains all the evidence received on the trial. If the Court can ascertain on the face of the record, no matter how, that the statement contains all the evidence ma-

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terial to objections raised by appellant, the rule is fully complied with. It seems to us not indispensable to *write* at the conclusion of the statement "that the above statement contains all the evidence," for we had already said, in the assignment of errors, that there was no evidence in support of various material allegations of the complaint. The only question to be considered is, can it be ascertained from the record that the statement contains all the evidence material to the points of objection?

III. It was error for this Court to strike from the record the certificate of the Judge that the statement contains all the evidence material to the objections raised by appellant, because the Court below had entire control of its record; this Court must take it as it comes up; and the record can be amended at any time. (*Til-lotson v. Cheetham*, 3 John. R. 94; *Rew v. Barker*, 2 Cow. 408; *Laysten v. Sneffen*, 1 Barb. 428; 3 Howard Pr. R. 250; 7 Howard Pr. R. 219; 1 Abbott's National Digest, 77, Note 61, 62; 1 How. Pr. R. 226; 2 How. Pr. R. 102.)

IV. The first instruction ignores the question of agency—whether the persons in charge of the cars were the agents or servants of defendant or of some other party. This is not law, and the instruction was calculated to mislead the jury.

The third instruction was to the effect that the law does not fix any precise rule of damages. As a matter of fact the law does fix a precise rule of damages, and it is this: that the party injured is entitled to compensation for his injuries. The instruction was therefore erroneous.

M. Kirkpatrick and *H. I. Thornton*, for Respondent.

I. The service of summons on Gillett, the agent of the company in this State, was good; but if not, the summons was subsequently sent to California, and served on the secretary by a person duly appointed by the Judge of Elko County; and this service was unquestionably good.

II. The statement does not affirmatively show that it contains all of the evidence adduced upon the trial; and in support of the judgment, if the evidence presented falls short, it will be presumed

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that there was other and sufficient evidence to justify the verdict (*Sherwood v. Sissa*, 5 Nev. 358.) And therefore the objections on account of insufficiency of evidence will not be regarded.

III. The right to make rules is given by statute. (Stats. of 1864-5, 112.) And the rule of the Court below, as to notice of motion to retax costs, is proper and abridges no right.

By the Court, LEWIS, C. J. :

Before answering in this case, the defendant moved the District Court to set aside the service of summons made upon one of its agents in this State, upon affidavits setting out that he was not the proper person upon whom to make service. After notice of the motion, but before hearing, the plaintiff made an affidavit to the effect that the defendant was a foreign corporation, organized in the State of California; and that it had no president or other head, secretary, cashier or managing agent, within the State of Nevada, upon whom service of summons could be made; and upon it applied for and obtained an order appointing some person in California to serve the same in that State. This course is authorized by section twenty-nine of the Code of Procedure which reads thus: "Provided further that when such California corporation has no president or other head, secretary, cashier or managing agent upon whom service of summons can be had, the Court before which such action has been brought, or the judge thereof, may upon affidavit of the plaintiff showing the existence of the foregoing facts, make an order for the service on the defendant of a copy of the summons and complaint in the action. Such service may be made by some competent person appointed by the Court, or the judge thereof, or by the sheriff of the County within the State of California, within which the principal place of business of such corporation may be located. The service shall be upon the president or other head, secretary, cashier or managing agent of such corporation, and when proved to the satisfaction of the Court, by the sworn return of said sheriff or other person so appointed, shall be for all purposes as valid and effective as if made by a competent officer within this State. And in case such corporation shall not appear in the action

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within forty days after such service, its default and judgment therein may be entered as in other cases." Service in accordance with this order was regularly made before the hearing of the motion to set aside the first service. The Court below denied the motion, and defendant excepted. It is unnecessary to determine whether the first service was regular and sufficient or not, or whether the Court should have granted the defendant's motion; for even if it be admitted, as claimed by counsel for defendant, that the service so made was a nullity, still the error, if any, committed in denying the motion, was cured by the regular and sufficient service afterward made. It does not necessarily follow that every error or irregularity committed by the Courts in the trial of a case authorizes a new trial, or interferes with the verdict or judgment. Errors may be committed which it is perfectly manifest could not possibly have prejudiced the rights of either party, being trivial and immaterial.

Again, an error may occur in some material matter or step in the proceedings, and yet all injurious results be obviated by subsequent proceedings, and so rendered harmless. Thus, for illustration, if a motion for non-suit be made by the defendant upon the ground of failure to prove some material fact, although it appears the motion should have been sustained when made, still if the proof failed to be produced by plaintiff be afterward supplied, even by the defendant, the error in the ruling upon the motion will be unavailing on appeal. So it is very generally held that a verdict and judgment will not be disturbed for errors committed at the trial which it is apparent could not possibly have changed or modified them. Indeed, it may be stated generally that no error is noticeable or deemed material, which as shown by the record did not, or could not, prejudice the rights of the party complaining. (See *Fleeson v. The Savage Mining Company*, 3 Nev. 157.)

Admitting, then, that the Court erred in denying the defendant's motion to quash, yet if the record shows that such error did not result prejudicially, it is not sufficient to warrant a reversal of the judgment. We are unable to see how it could have effected an injury to the appellant. Good and sufficient service was made upon it, after that which is claimed to have been insufficient. It was not

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denied that the service made in California was in exact accordance with the statute. The summons so served gave the defendant forty days wherein to answer the complaint. This was the time given by the statute, and the record shows that the full time expired before the answer was filed. But counsel claimed that they were prejudiced by the ruling, because the time to answer was shortened. However, the record shows no such fact. The second summons gave forty days, and the defendant took that entire time. Again, it is argued that it was prejudiced, because by the denial of the motion, the costs attending it were made taxable against it instead of the plaintiff, as they should have been if the motion was properly decided. But the record does not show that the costs of the motion were taxed against appellant. And even if they were, that would be no ground for reversing the judgment, for it is clearly within the power of the Court to permit the costs of all motions of this kind, made during the progress of the trial, to abide the event of the suit. The statute does not require the costs of such motions to be taxed against the losing party; nor do we know of any rule of practice making it the duty of the Court to do so. The first error assigned is not therefore well taken.

The second assignment is, that the Court erred in overruling the defendant's motion to transfer the action to the Circuit Court of the United States. This motion was made upon petition, setting out that the plaintiff was a citizen of the State of Nevada, and that the defendant was a citizen of California, with all the other facts required in such petition. The plaintiff, however, opposed the motion thus made by an affidavit made by himself, accompanied by several others in support of it, showing very conclusively that he was not, and never had been, a citizen of the State of Nevada; but was at the time of suit brought, and for years prior thereto had been, a citizen of the State of Missouri. Upon these affidavits the motion was denied. If the Court had the right to make an inquiry as to the truth of the facts set out in the petition, or hear any proof in opposition to it, (and this is not denied) we cannot see how it could have decided the motion differently. If the plaintiff was a citizen of the State of Missouri, his action brought in the Courts of the State of Nevada is not of those authorized to be transferred

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to the Federal Courts; and that he was so, can hardly admit of a doubt on the affidavits presented. The judgment cannot be disturbed on this ground.

The third, fourth, fifth and seventh grounds of error, are based on a supposed failure on the part of the plaintiff to prove certain facts material to his case, or to sustain the verdict. Thus, the third rests upon the failure to show that the injuries received by the plaintiff resulted from the negligence of the defendant or its agent, and to prove that the relation of master and servant existed between defendant and those who contributed to the injury of plaintiff. The fourth ground is, that the plaintiff adduced no evidence to show that the defendant was a common carrier. The fifth is, that the evidence shows that plaintiff received compensation for his injuries before bringing this action, and executed and delivered to the defendant a written discharge of all liabilities. This is undoubtedly true; but the plaintiff answered to this defense, that he was incapable of making any such contract at the time it was executed, by reason of mental derangement resulting from his injuries. It is admitted there was some evidence to sustain this position taken by the plaintiff. The seventh is that the damage is excessive. It is a sufficient answer to these four assignments that the record does not purport to contain all the evidence bearing on the points. For aught that appears of record, the evidence did show the injuries to be the result of the negligence of the defendant's agents or servants, that the defendant was a common carrier of passengers, and that the plaintiff was entirely incapable of executing the release relied on; and that it was disaffirmed by him within a reasonable time after his disability was removed.

We say the record does not show that all these facts were not proven at the trial, and in the absence of such affirmative showing this Court is controlled by the presumption of law that all facts necessary to support the verdict and judgment were properly and sufficiently proven. Such has been the uniform ruling of this Court since its organization, (*Sherwood v. Sissa*, 5 Nev. 34) and is also the rule adopted by the Courts of nearly all the States. To obviate the result of this rule, a certificate was obtained from the Judge of the Court below, to the effect that the statement con-

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tained all the evidence brought out at the trial. But the statute does not contemplate such certificate by the Judge. He is simply required to certify that the statement has been allowed by him and is correct. (Practice Act, Sections 335 and 197.) His certificate would probably cover nothing but what this section requires him to certify to. However, in this case it was shown that the certificate thus made was substituted for one which contained no statement that the record embodied all the evidence, and that substitution was also made long after the new trial had been denied, the appeal perfected, and the transcript for this Court had been made out, and so had legally become a record of this Court. Such a practice is not permissible. If it were allowed, one of the objects of requiring a showing that the statement contains all the evidence, namely, to give the respondent an opportunity to supply any material evidence which may have been left out by the appellant, would be defeated. As the rule stood in this State when the statement on motion for new trial in this case was made out, there was no necessity whatever of his supplying any evidence omitted, for he had the right to rely upon the rule, that no notice would be taken of any point resting on the ground that the evidence did not support the verdict, if the statement did not show affirmatively that it embodied all the material testimony. If after the order is made overruling a motion for new trial, the Court may add such certificate, and so support a ruling which possibly could not otherwise be maintained, the respondent would never be safe in relying upon the rule adopted by this Court. The rule itself would be virtually abrogated, for the respondent could never safely rely on it; but in every case where the entire absence or insufficiency of evidence is assigned by the appellant, the respondent would be compelled to supply any omitted evidence which he might deem necessary to maintain the judgment of the Court. To maintain the rule and the practical benefits supposed to flow from it, it is necessary to adhere to the interpretation given to the statute in the case above referred to, namely, that the statement itself must show that it contains all the material evidence upon any point claimed by appellant not to be proved, or it will not be noticed in this Court. For these reasons we are constrained to pass over the third, fourth, fifth

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and seventh assignments of error, without investigating their respective merits.

The sixth ground relied on is error in giving instructions one and three asked by the plaintiff. The first reads thus: "If the jury from the evidence believe that the plaintiff was a passenger on the railroad and train of defendant, as alleged in the complaint, and had paid his fare to the conductor of the train; and that the plaintiff, whilst such passenger, was injured; and that the injuries so sustained by him were occasioned by and the result of the gross negligence of the servants, agents and employees in charge of said train, in the management, directing and conduct thereof; and if the jury further believe that the release set out in the answer of defendant was executed by the plaintiff when he was *non compos mentis*, then you must return a verdict for the plaintiff."

The objection made to this instruction is, that it does not make it necessary for the jury to find that the persons in charge of the train at the time the injuries were received were in the immediate employ of, or acting at the time as the servants of, the defendant. Although not directly stated to be necessary, we think it can fairly be inferred from the instruction that the finding of that fact was essential to the plaintiff's case. But however that may be, it is in other instructions, and in the charge given by the Court upon its own motion, expressly stated to be a fact necessary to be found before a verdict could be rendered for the plaintiff. Thus, in the eighth instruction given at the request of defendant, the jury were told that "If the plaintiff at the time of receiving the injuries complained of was a passenger on the train of the Finance and Construction Company instead of the car or train under the control of defendant, the plaintiff should not recover." And the seventh instruction is to the same effect: "the jury being charged that although the defendant might be the owner of the cars and engine by which the plaintiff was traveling at the time of the injury, still if the train were not under its control the defendant was not liable." Again: the first instruction given by the Judge upon his own motion makes the fact that the train was under the management of the defendant or its agents at the time of the injuries essential to the plaintiff's right of recovery.

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Thus, if the question were not fairly and explicitly submitted to the jury in the instruction complained of, it was so by the other instructions and by the charge of the Judge. It is a rule of law, than which none is more reasonable, that in determining whether any given instruction or a portion of a charge be erroneous, or is calculated to mislead the jury, the whole must be taken together and considered as an entirety. When, therefore, anything essential is omitted from an instruction, or any particular portion of a charge, still if found elsewhere or in another instruction given to the jury, the omission will not be deemed fatal: for in such case the charge as a whole, or the instructions taken together and not in the abstract, would be complete, and all that is required is that the law be fairly and clearly stated to the jury, that they be not misled by an incorrect statement of it. If, therefore, taken as an entirety the charge or instructions fairly state the law, they must be sustained.

This rule has its application also to the third instruction complained of, which reads thus: "In actions like this, the law does not fix any precise rule of damage, but leaves the amount to the unbiassed judgment of the jury." We certainly cannot say that this instruction is incorrect: as we understand it, it simply amounts to a statement that the law has fixed no exact measure of damage, or provided any exact method whereby the amount may be ascertained. This is undoubtedly true. In the case of a breach of contract for the payment of money, for example, the law fixes a precise rule of damage in all cases, which is legal interest on the principal; but in cases of this kind, the different results daily occurring in actions brought for similar injuries, demonstrate, at least, the truth of the instruction. Thus, one person is awarded ten, fifteen or twenty thousand dollars; while another, for an identical injury, may recover a mere nominal sum: however, there are in every case certain facts and conditions to be considered by the jury in determining the damage to be awarded, and others, of course, which should in no wise enter into their deliberations. Now, in this case the Court charged correctly in this respect. By the instructions following the last quoted, they were charged that in estimating the amount of damage, if any, suffered by the plaintiff, they

might take into consideration the nature and extent of his injuries, his physical suffering resulting therefrom, and his prospective disability. So, also, the Judge in his charge correctly states the elements to be considered in the ascertainment of the damages to be allowed. He says, you are to fairly and dispassionately consider all the evidence tending to show the nature and extent of the plaintiff's injuries, his physical suffering, and the prospective disability occasioned by the injuries. These are unquestionably the matters to be considered by the jury in the ascertainment of the sum to be given as compensation of the injured party; if, therefore, instruction third be not correct, its subject matter, the manner of arriving at the damage, or the matters to be considered in making the assessment, being correctly and fairly stated to the jury in the other instruction, no injury can be supposed to flow from it.

The eighth assignment of error is that the Court erred in overruling the motion to re-tax the costs. It appears that the motion was made and partially argued on the merits. Further argument was postponed for several days. Upon the second hearing, the objection was made by counsel for plaintiff that a certain rule of Court had not been complied with. That rule declares that "no bill of costs shall be re-taxed unless notice of a motion to re-tax be served within two days after the filing the same." This notice, it appears, was not given; hence the objection to the hearing. It is claimed, however, that the notice was waived by the appearance of counsel for appellant, and the partial argument of the motion on its merits.

Rules of Court are generally made as much for the convenience of Court as for any other purpose. The Courts usually have the power to adopt any rules not in conflict with law. Where they have done so, and they are reasonable, and there appears to be no legal objection to them, there should be no interference by any appellate tribunal with their enforcement. If rules be adopted for the convenience of the Court, we apprehend that the Court itself has some interest in enforcing them, and may or may not allow counsel to waive their requirements. In this case, it was not deemed advisable by the Court below to hold the rule referred to waived by the failure of counsel to urge the rule against the motion

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at the earliest opportunity. We do not feel authorized to interfere with the Courts in enforcing their own rules, the rules themselves being legal.

The judgment of the Court below is affirmed.

GARBER, J., did not participate in the foregoing decision.

THE STATE OF NEVADA EX REL. CHARLES G. HUBBARD, v. JOHN D. GORIN.

TERMS OF OFFICE OF DISTRICT JUDGES. The Lincoln County Act, (Stats. 1867, 129) in so far as it provided that the district judge to be elected in 1868 should hold his office for two years from January 1st, 1869, did not violate the constitutional provision (Art. VI, Sec. 5) as to terms of district judges.

TIME OF ELECTION OF DISTRICT JUDGES. The Constitution contemplates that the election of district judges throughout the States shall all occur at the same time; and it is competent for the legislature to provide that a judge to be elected at another time shall hold only till the time of such general election of judges, though it may not give him a full term of four years.

NOTICE OF ELECTION FOR FULL TERM NOT INDISPENSABLE. Where a full term of the office of district judge is to be filled, the failure to give notice of election (such as is required when a vacancy is to be filled) will not vitiate an election.

THIS was an original proceeding in the Supreme Court. It was instituted by the relator on behalf of Judge Fuller, and the petition was signed by the Attorney General. At the time of Judge Gorin's appointment, the County of Lincoln constituted the Ninth Judicial District; but it now constitutes the Seventh, and it was for a district judge of the Seventh Judicial District that the election of 1870 was held.

Clarke & Wells and *A. C. Ellis*, for Relator.

J. S. Pitzer, for Defendant.

By the Court, LEWIS, C. J. :

By section five of an Act adopted by the Legislature of 1867, it is provided that the County of Lincoln (which was created by the

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same Act) should constitute the "Ninth Judicial District, and a judge thereof shall be appointed by the governor, who shall hold his office until his successor is elected and qualified; and he shall receive a salary of eighteen hundred dollars a year, payable out of the treasury of said county, *provided* that his successor shall hold his office two years from the first day of January, A.D., 1869, and shall receive an annual salary of three thousand dollars." Under this law, Charles A. Leake was elected to this judgeship, in November, A.D. 1868, and entered upon the duties of his office as provided in the section above quoted. In the month of August, A.D. 1870, he died, and the governor duly appointed the defendant, Gorin, to succeed him. At the general election held in November, A.D. 1870, Mortimer Fuller was elected to succeed Gorin, for the full term of four years. The defendant having refused to surrender the office, this proceeding is instituted to determine the right thereto.

Gorin places his right to retain the position upon the assumption that the election of Leake was for the full term of four years instead of two; the law so far as it limited it to two years being in conflict with section five, article six of the Constitution, which declares among other things that "The district judges shall be elected by the qualified electors of their respective districts, and shall hold office for the term of four years (excepting those elected at the first election) from and including the first Monday of January next succeeding their election and qualification." By this authority it is claimed the restriction of Leake's term of office to two years was illegal, and consequently that his election was for a full term.

Assuming such to be the case, it is admitted the election in November, A.D. 1870, could only be for the residue of Leake's term, under another section of the Constitution concerning the filling of vacancies, which is as follows: "In case the office of any Justice of the Supreme Court, District Judge, or other State officer, shall become vacant before the expiration of the regular term for which he was elected, the vacancy may be filled by appointment by the Governor, until it shall be supplied by the next general election, when it shall be filled for the residue of the unexpired term."

But it is argued, if Fuller was elected simply to fill the unexpired

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term of Leake, notice should have been given to the electors that such office was to be filled, as required by the election law. This not having been given, the conclusion arrived at is that his election was void. This, in brief, is the position taken by Gorin.

We find it entirely unnecessary to decide whether, if Fuller were in fact elected to fill a vacancy, a failure to give the required notice would vitiate it; for we have concluded that the Act of 1867, limiting the term of the first incumbent by election to two years was constitutional, and hence that Fuller was regularly elected, not to fill a vacancy, but a full term of four years. This conclusion we arrive at in this manner.

Section five, which declares that District Judges elected, etc. "shall hold office for the term of four years," simply means that four years shall be the regular full term of the district judgeship of this State. By the literal language of the Constitution, it is made incumbent upon every person elected to the judgeship to continue in the office for the period of four years. It will certainly not be claimed that any such construction is to be placed upon the clause in question, and the only other which can be placed upon it, is that it fixes the term of the office, and not of the officer. Nor does the election of a person to the office of judge necessarily fix the beginning of a four years term; for that may be, by the section quoted concerning the filling of vacancies, an election for a fractional part of a term. And it is from the reason which gave rise to this latter section, that we find a solution of this case. What, then, was the object sought to be accomplished by the provision limiting the election of judge, when a vacancy has occurred, to the residue of the unexpired term? A vacancy having happened, why not at the first opportunity allow the people to fill the office for the full term of four years? Manifestly, we think, because it was deemed desirable to have the election of these judges occur at the same time throughout the State, to prevent the expiration of one term at one time and another at another time. The beginning of the first term of office is definitely fixed in the Constitution, and it is provided that general elections shall recur every four years thereafter. Then it is evident that the term of office of all judicial districts formed by the Constitution itself, must inevitably and always begin

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and expire at the same election. This result cannot possibly be avoided. The consequence or result naturally and necessarily flowing from any clause or section of the Constitution, it is fair to presume, was intended by the framers of that instrument. Can any other conclusion be arrived at, than that the thing so completely accomplished was intended? Certainly not. And what was intended, respecting the judicial districts created by the Constitution itself, may with equal reason be said to have been intended respecting all districts afterwards created; the section limiting the election of a person to a vacant term having reference to all terms, whether in districts created by the Constitution or otherwise. If it be the object of the Constitution to have the election of district judges for the regular term throughout the State occur at the same time, may not the Legislature, when it creates a new judicial district, provide for filling the office until the recurring of the general election, at which all the other judges are required to be elected? We think it can; for if interpreted by the light of this purpose sought to be effected by the Constitution, the term of office fixed at four years by the section quoted means, and can only mean, the regular term beginning at the general election of judges throughout the State. Thus, the Act of the Legislature effects the object of the Constitution, and is not in conflict with the section fixing the term of the judgeship at four years; as it simply provides for a special filling of the office until the general election for district judges throughout the State, at which time, under the general election law, it would naturally be filled by an election for the full term.

By this construction, what seems to us a very clear purpose of the framers of the Constitution is fully carried out, namely: the election of all the district judges throughout the State for the regular term at the same time, and also at the election of the State officers generally. (See, as fully sustaining our views, *Jackson v. Emerson*, 39 Missouri; *Smith v. Halfacre*, 6 Howard Miss. Rep. 582.)

The election of Fuller, then, was not to fill a vacancy, but for a full term. It follows, therefore, that a failure to give notice, as required when a vacancy is to be filled, could not affect his election;

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the law itself in such cases being sufficient notice of all the offices to be filled.

The person on whose behalf this application is made being legally elected, is entitled to the office. Judgment of ouster must be entered against defendant.

THE STATE OF NEVADA, RESPONDENT, v. WASHINGTON WALLIN, APPELLANT.

APPEAL—POINTS NOT COVERED BY TRANSCRIPT NOT CONSIDERED. Alleged error in refusing to grant a continuance cannot be considered by the Supreme Court, if the affidavits are not properly in the transcript, and there is no bill of exceptions, nor statement.

APPEAL from the District Court of the Eleventh Judicial District, Elko County.

Defendant was indicted with John G. Watson, for the crime of robbing Charles Haynes of three thousand and three hundred dollars and other property, belonging to Wells, Fargo & Co., in Elko County, on May 1st, 1870. Being convicted, defendant was sentenced to the State prison for the term of twenty-five years.

There appears to have been a motion for continuance made in the Court below on affidavits, which are copied into the transcript; but there is nothing to identify them or show that they were used on the motion.

T. D. Edwards and *Thomas Wells*, for Appellant.

L. A. Buckner, Attorney General, for Respondent.

The affidavits for continuance are not embodied or referred to in any bill of exceptions or statement, and are therefore no part of the record. (*People v. Price*, 17 Cal. 310; *People v. Thompson*, 28 Cal. 218; *People v. John B. Ferguson*, 34 Cal. 309; *People v. Wilson*, 5 Nev. 43.)

The State of Nevada v. Little.

By the Court, WHITMAN, J. :

This case falls within the rule heretofore adopted by this Court. The affidavits alleged to have been used on the motion for continuance are not properly in the transcript and cannot be considered ; there is no bill of exceptions, nor any statement. (*State v. Wilson*, 5 Nev. 43.) No objection is made upon the indictment or the instructions of the Court, and no error appears therein. The only error assigned is the refusal of a continuance ; the minutes of the Court show such a ruling, and nothing more. It cannot be presumed to be erroneous, in absence of an affirmative showing to that effect.

The judgment is affirmed.

THE STATE OF NEVADA, RESPONDENT, v. WILLIAM
LITTLE, APPELLANT.

INSTRUCTION TO JURY NOT TO FIND HIGHER GRADE OF CRIME. On a murder trial, the judge instructed the jury that under the law and evidence it would not be justified in finding a verdict for any higher grade of offense than manslaughter : *Held*, on appeal by defendant, not necessarily a charge that the State had made out a case of manslaughter.

CRIMINAL LAW—CHARGE IN DEFENDANT'S FAVOR. Where a jury in a murder case was charged that it would not be justified under the law and evidence, in finding a verdict for any higher grade of offense than manslaughter : *Held*, that though the instruction (which was authorized by section three hundred and seventy-six of the Criminal Practice Act) might be repugnant to the constitutional clause against charging as to matters of fact, yet it was not to defendant's prejudice, and he could not complain.

APPEAL from the District Court of the Fifth Judicial District, Humboldt County.

Defendant was indicted for the murder of George Lithicote, alleged to have been committed by shooting with a pistol, in Humboldt County, about May 1st, 1870. Being convicted of manslaughter, he was sentenced to imprisonment in the State prison for five years.

The State of Nevada v. Little.

M. S. Bonnifield, for Appellant.

It is evident from the instruction, that the State failed to make out a case of murder, and it is to be presumed that under the circumstances the jury would have found a verdict of not guilty. The Court however, said in substance: "Although the State has failed to establish the guilt of the defendant as charged, yet it is my opinion that it has made out a case of manslaughter, and I instruct you so to find." In other words, the judge expressed his opinion as to the guilt of defendant of manslaughter, and instructed the jury to find such a verdict; and that the jury was influenced by his opinion, is evident from the fact that it found a verdict in exact accordance with the instruction.

By the Court, WHITMAN J.:

The appellant was indicted for murder; tried, and convicted of manslaughter. The only error complained of is, that the Court instructed the jury as follows: "I am satisfied under the law and the evidence that the jury would not be justified in finding a verdict for any higher grade of offense than manslaughter, and will so instruct you." This, appellant argues, was to his prejudice; claiming that it was in fact an expression of opinion on the part of the Court that the State had made out a case of manslaughter, and an instruction to the jury to so find.

This is a forced construction of the language. The instruction is an advice to the jury upon the question of the innocence of the prisoner of the primary crime charged in the indictment, which, under the statute (Statutes 1861, 474, Sec. 376) the Court has always a right to give, and which the jury may or may not follow; and a submission of the facts and law to their consideration as to the question of his guilt of the only remaining crime within the range of the indictment. It is possible that the statute referred to may be repugnant to that clause of the Constitution which provides that "judges shall not charge juries in respect to matters of fact." However that may be, the complexion of the present case is not altered; as admitting such repugnance, the error of the instruction was against the State, and consequently not to appellant's wrong.

The County of Ormsby v. The State of Nevada.

A case may be imagined where the instruction would be wrong, as for instance : where the prosecution failed to produce any evidence tending to prove any crime within the indictment. If that is this case, it was the business of the appellant to bring the evidence to this Court for inspection. This has not been done, and therefore the only legal presumption is that the instruction was warranted by the evidence.

A review of the whole charge as contained in the transcript justifies the assertion that the appellant has no cause of complaint. The Court first says : " Gentlemen of the jury—by the statute you are made the judges of the degree of the crime committed, if you find that any was committed at all, by the defendant." Then follows a separate definition of murder in the first and second degree—manslaughter and excusable homicide, closing with the instruction first quoted. No ingenuity can conjure an error therefrom to appellant's prejudice.

The judgment is affirmed.

THE COUNTY OF ORMSBY, RESPONDENT, v. THE STATE
OF NEVADA, APPELLANT.

RENT OF PUBLIC BUILDINGS LEASED TO STATE. Under the Act of 1869, providing for the payment of claims against the State "for services or advances," (Stats. 1869, 104): *Held*, that the rent of premises occupied by the State was embraced within the meaning of the word "advances."

POPULAR MEANING OF "ADVANCES." The word "advances," as employed in the Act of 1869, relating to claims for services or advances to the State, (Stats. 1869, 104) is there used rather in its popular than in its strict legal definition, and includes rents of buildings used by the State.

STATUTORY CONSTRUCTION—POPULAR AS OPPOSED TO TECHNICAL MEANING OF WORDS. The rule that technical words used in a statute are to be taken in their technical sense, is subject to the qualification that it is only when used with reference to the particular subject as to which they have a special meaning, that they are to receive such meaning ; but that if used generally, their popular meaning is the one intended.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

The State of Nevada v. Little.

M. S. Bonnifield, for Appellant.

It is evident from the instruction, that the State made out a case of murder, and it is to be presumed that under the circumstances the jury would have found a verdict of murder. The Court however, said in substance: "Although the State failed to establish the guilt of the defendant beyond a reasonable doubt, in my opinion that it has made out a case of manslaughter." In other words, the Court gave its opinion as to the guilt of defendant of manslaughter, and directed the jury to find such a verdict; and that the State, by his opinion, is evident from the fact that the instruction was in exact accordance with the instruction.

By the Court, WHITMAN J.:

The appellant was indicted for murder; and the jury was instructed to find manslaughter. The only error complained of was that the Court instructed the jury as follows: "I am satisfied that the evidence shows the guilt of the defendant beyond a reasonable doubt for any higher grade of offense than manslaughter." This, appellant argues, was to instruct the jury that it was in fact an expression of opinion that the State had made out a case of manslaughter, and that the Court that the State had made out a case of manslaughter, and that the Court instructed the jury to so find.

This is a forced construction of the language of the instruction. It is an advice to the jury upon the question of the guilt of the prisoner of the primary crime charged in the indictment, and under the statute (Statutes 1861, 474, Sec. 10, which gives the jury always a right to give, and which the jury may give, and a submission of the facts and law to the jury, and the question of his guilt of the only remaining crime in the indictment. It is possible that the State may be repugnant to that clause of the Constitution that "judges shall not charge juries in respect to the facts and law." However that may be, the complexion of the instruction is not altered; as admitting such repugnance, the instruction was against the State, and consequently n

The County of Ormsby v. The State of Nevada.

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A review of the whole charge as contained in the transcript justifies the assertion that the appellant has no cause of complaint. The Court first says: "Gentlemen of the jury—by the statute you are made the judges of the degree of the crime committed, if you find that any was committed at all, by the defendant." Then follows a separate definition of murder in the first and second degree—manslaughter and excusable homicide, closing with the instruction first quoted. No ingenuity can conjure an error therefrom to appellant's prejudice.

The judgment is affirmed.

THE COUNTY OF ORMSBY, RESPONDENT, v. THE STATE OF NEVADA, APPELLANT.

RENT OF PUBLIC BUILDINGS LEASED TO STATE. Under the Act of 1869, providing for the payment of claims against the State "for services or advances," (Stats. 1869, 104): *Held*, that the rent of premises occupied by the State was embraced within the meaning of the word "advances."

POPULAR MEANING OF "ADVANCES." The word "advances," as employed in the Act of 1869, relating to claims for services or advances to the State, Stats. 1869, 104) is there used rather in its popular than in its strict legal definition, and includes rents of buildings used by the State.

STATUTORY CONSTRUCTION—POPULAR AS OPPOSED TO TECHNICAL MEANING OF WORDS. The rule that technical words used in a statute are to be taken in their technical sense, is subject to the qualification that it is only when used with reference to the particular subject as to which they have a special meaning, that they are to receive such meaning; but that if used generally, their popular meaning is the one intended.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

strict legal definition,
by County v. State of

NEW TRIAL ORDER—

STITUTION—see CON-

—see CONSTRUCTION, 6.

1.

STATUTE OF FRAUDS, 2.

MANDAMUS, 2

URETIES FOR—see AS-

ASSESSOR, 2.

7.

CONTRACT—see CON-

INUANCE, 1.

NTY COMMISSIONERS, 1.

INJUNCTION, 1.

—see MANDAMUS, 1.

TRIAL, 4.

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M. S. Bonnifield, for Appellant.

It is evident from the instruction, that the State made out a case of murder, and it is to be presumed that under the circumstances the jury would have found a verdict of murder. The Court however, said in substance: "Although the State failed to establish the guilt of the defendant as charged, in my opinion that it has made out a case of manslaughter, I instruct you so to find." In other words, the Court gave its opinion as to the guilt of defendant of manslaughter, and directed the jury to find such a verdict; and that the State, by his opinion, is evident from the fact that the instruction was given in exact accordance with the instruction.

By the Court, WHITMAN J.:

The appellant was indicted for murder; but the jury found him guilty of manslaughter. The only error complained of was that the Court instructed the jury as follows: "I am satisfied that the evidence shows the evidence that the jury would not be justified in finding for any higher grade of offense than manslaughter, I instruct you." This, appellant argues, was to be construed that it was in fact an expression of opinion by the Court that the State had made out a case of manslaughter, and instructed the jury to so find.

This is a forced construction of the language of the instruction. It is an advice to the jury upon the question of whether the defendant is a prisoner of the primary crime charged in the indictment under the statute (Statutes 1861, 474, Sec. 10, which gives the jury always a right to give, and which the jury may give, and a submission of the facts and law to the jury, and the question of his guilt of the only remaining offense in the range of the indictment. It is possible that the instruction may be repugnant to that clause of the Constitution that "judges shall not charge juries in respect to matters of fact." However that may be, the complexion of the instruction is not altered; as admitting such repugnance, the instruction was given against the State, and consequently not

A case may be imagined where the instruction would be wrong, as for instance: where the prosecution failed to produce any evidence tending to prove any crime within the indictment. If that is this case, it was the business of the appellant to bring the evidence to this Court for inspection. This has not been done, and therefore the only legal presumption is that the instruction was warranted by the evidence.

A review of the whole charge as contained in the transcript justifies the assertion that the appellant has no cause of complaint. The Court first says: "Gentlemen of the jury—by the statute you are made the judges of the degree of the crime committed. If you find that any was committed at all, by the defendant." Then follows a separate definition of murder in the first and second degree—manslaughter and excusable homicide, closing with the instruction first quoted. No ingenuity can conjure an error there from to appellant's prejudice. The judgment is affirmed.

THE COUNTY OF ORMSBY, RESPONDENT, v. THE STATE OF NEVADA, APPELLANT.

RENT OF PUBLIC BUILDINGS LEASED TO STATE. Under the Act of 1869, providing for the payment of claims against the State "for services or advances," (Stats. 1869, 104): Held, that the rent of premises occupied by the State was embraced within the meaning of the word "advances."

POPULAR MEANING OF "ADVANCES." The word "advances," as employed in the Act of 1869, relating to claims for services or advances to the State, (Stats. 1869, 104) is there used rather in its popular than in its strict legal sense, and includes rents of buildings used by the State.

STATUTORY CONSTRUCTIONS—POPULAR AS OPPOSED TO TECHNICAL MEANING, OR WORDS.

The rule that technical words used in a statute are to be taken in their technical sense, is subject to the qualification that it is only when used with reference to the particular subject as to which they have a special meaning, that they are to receive such meaning; but that if used generally their popular meaning is the one intended.

APPEAL from the District Court of the Second Judicial District, Ormsby County.

strict legal definition, by County v. State of

NEW TRIAL ORDER—

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—see CONSTRUCTION, 6.

1.

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URETIES FOR—see AS-

—see ASSESSOR, 2.

7.

CONTRACT—see CON-

INJUNCTION, 1.

COMMISSIONERS, 1

INJUNCTION, 1.

—see MANDAMUS, 1.

TRIAL, 4.

The State of Nevada v. Little.

M. S. Bonnifield, for Appellant.

It is evident from the instruction, that the State made out a case of murder, and it is to be presumed that under the circumstances the jury would have found a verdict of murder. The Court however, said in substance: "All the evidence failed to establish the guilt of the defendant; and in my opinion that it has made out a case of manslaughter, I instruct you so to find." In other words, the Court gave its opinion as to the guilt of defendant of manslaughter, and the jury to find such a verdict; and that the instruction, by his opinion, is evident from the fact that it was given in exact accordance with the instruction.

By the Court, WHITMAN J.:

The appellant was indicted for murder; but the jury found him guilty of manslaughter. The only error complained of was that the Court instructed the jury as follows: "I am satisfied that the evidence shows the evidence that the jury would not be justified in finding for any higher grade of offense than manslaughter, I instruct you." This, appellant argues, was to be construed that it was in fact an expression of opinion by the Court that the State had made out a case of manslaughter, and the instruction to the jury to so find.

This is a forced construction of the language of the instruction. It is an advice to the jury upon the question of whether the defendant is a prisoner of the primary crime charged in the indictment under the statute (Statutes 1861, 474, Sec. 1000), which gives him always a right to give, and which the jury may find in his favor, and a submission of the facts and law to the jury, and the question of his guilt of the only remaining crime in the range of the indictment. It is possible that the instruction may be repugnant to that clause of the Constitution that "judges shall not charge juries in respect to matters of fact." However that may be, the complexion of the instruction is not altered; as admitting such repugnance, the instruction is still valid, as it was against the State, and consequently not

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what is sought, or uniting with the defendant, or demanding something adversely to both. The respondents do not occupy any of these positions.

Clarke & Wells, for Respondents.

I. Under our statute, only one suit can be maintained to enforce contemporaneous liens on the same property, and hence, after such suit has been commenced, the arbitrary action on the part of one or more of the lien holders cannot defeat or impair the rights of the others.

II. The giving of notice by the party commencing the action is in no wise any part of the commencement of the suit. It is his duty to do it, that others having liens may know of the action and come in; but if they come in upon *actual*, and not *constructive*, notice, they are in upon *right* and the object is accomplished.

III. No order of Court was necessary in order that the respondents might appear in the action. They were not "intervenor" in the sense in which that term is used in our Practice Act. They came in as lien holders under the statute of 1861, and not as permissive intervenors under the code.

By the Court, WHITMAN, J. :

John O'Connell and Philip Splain commenced an action under the statute to foreclose a mechanics' lien against William Ivers, joining Lewis Cook as party defendant having an interest in the property sought to be held. Issue was joined Oct. 4th, 1869. On the twentieth of the same month, the parties above designated as lien claimants filed petitions of intervention, Petty & Doane appearing in one and Elliott in the other. To the former, a general answer was filed; to the latter, a demurrer: both on the second of November, 1869. It does not appear affirmatively from the transcript that this demurrer was ever disposed of, but no objection is made on that ground. On the eighteenth of March, 1870, the case was called for trial, when, in the matter of O'Connell and Splain, the following notice was given by their attorney: "The clerk will enter dismissal in the above-entitled action, the same having been settled." An

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order of dismissal was thereon entered; whereupon the defendants objected to proceeding with the matters of the petitioners, because the original suit had been dismissed, and because no notice to lien claimants had been filed. The objection was overruled, trial had, whereat, as is shown by the transcript, all the allegations of the petitioners were proven, and they had judgment and decree as prayed.

The first assignment of error is based upon the action of the Court, as just stated, in proceeding to try the issues between the petitioners and Ivers & Cook. The statute undoubtedly contemplates a formal suit, a publication of notice, an appearance upon the part of lien claimants other than those commencing the suit, and a disposition of the entire matter of liens against the property affected, in one proceeding. Any person prejudiced by any error in the proceedings may undoubtedly object thereto. Do the appellants occupy such position? The suit was regularly commenced. So far as appears by the transcript, no notice was published; the statute does not require one to be filed, but its object was accomplished, and from the action of the Court, presumptively, all other lien claimants appeared. The manner of their appearance was more formal than requisite under the statutory provision; but the appellants could not be injured thereby, and the manner is certainly proper, though perhaps not necessary. (*Mars v. Mackey*, 14 Cal. 127.)

So soon as these parties had appeared, the Court had jurisdiction of the subject matter, the parties and the whole thereof, and could not thereafter be divested of such jurisdiction by any action of the original plaintiffs. They had the right to retire from the contest, but they could not withdraw the subject matter so far as it concerned others who had become legally actors thereabout; nor could they compel the withdrawal of parties not in privity with them or their individual claims. So the Court properly proceeded with the investigation of the case, and as has been said, was and is fully sustained in its findings and decree by the proofs. This disposes of the remaining assignments, which assert absence or failure of proof upon certain points as against the evidence of the record. The judgment of the District Court is affirmed.

SACRAMENTO AND MEREDITH MINING COMPANY,
APPELLANT, v. JAMES SHOWERS *et als.*, RESPONDENTS.

NEW TRIALS NOT MATTERS OF DISCRETION. The granting or refusing a new trial is not a matter of mere discretion.

"TREATING THE JURY" CAUSE OF REVERSAL. Where, during the progress of a trial and before retiring to deliberate, and while under charge of an officer for the purpose of viewing the ground in controversy, the jury went into a saloon and drank liquor at the expense of the prevailing party: *Held*, that the verdict and judgment thereon should be set aside.

WHAT TAMPERING WITH JURY AVOIDS VERDICT. The rule, that a verdict in favor of a party who treats or entertains the jury will be set aside, applies to any treating of any of the jury at any time after they are sworn and before they agree upon their verdict, whether once or several times, by design or inadvertently, in the presence of the officer or in his absence, and whether it might be called for or uncalled for by the proprieties of life.

APPEAL from the District Court of the First Judicial District, Storey County.

The plaintiff, a corporation, organized under the laws of California, commenced this action in February, 1870, against James Showers, O. C. Steel, B. F. Kenny and Goodwin Jones, to recover possession of a portion of the "Hearst and Meredith Ledge," and the "Sacramento Ledge," at Virginia City, upon which they were alleged to have intruded; for damages in the sum of \$600 on account of such intrusion, and for an injunction to prevent interference with the property. Defendants denied all the allegations of the complaint, and also set up ownership in themselves.

Sunderland, Wood & Deal, and *Williams & Bizler*, for Appellant.

The verdict should be set aside for irregularity of the proceedings of defendants, and for the misconduct of the juror, L. Sperling. (*Johnsen v. Root*, 2 Fish C. C. R. 291; *Henry v. Ricketts*, 1 Cranch C. C. R. 545; *Harrison v. Rowan*, 4 Wash. C. C. R. 32; *Thompson's Case*, 8 Grat. 660; 2 Sumner, 19; 1 Cush. 63; 2 McLean, 35; *Leighton v. Sargent*, 31 W. H. 11; For. 137; 7 Cowan, 562; 13 Conn. 445; *Purinton v. Humphreys*, 6 Green-

Sacramento and Meredith Mining Company v. Showers.

leaf; *Wilson v. Abrahams*, 1 Hill, 211; *Commonwealth v. Roby*, 12 Pick. 519.)

R. S. Mesick and J. Seeley, for Respondents.

Whatever may be thought of the decisions referred to by plaintiff as authority for reversing a judgment because the jury had partaken of liquor during the trial, none of them have any direct application to the present case. They refer to instances where the jury were permitted or induced in some manner to indulge in the liquor *after they had left the bar* and retired to their room to deliberate as to their verdict. It is necessary, under the authority of recent decisions, for the party claiming a reversal to show that the jury, by the use of liquor, had become incapable of proper deliberation, or that the civilities and attentions of the party to the action furnishing the refreshments were of such an unusual character, or were tendered under such circumstances, as to produce in the mind of the Court the belief that they had operated unjustly and prejudicially to the party against whom the verdict was rendered. (*Philipsburg Bank v. Fulmer*, 2 Vroom [N. J.] 52; 27 United States Digest, 456, Sec. 13; *Commonwealth v. Roby*, 12 Pick. 519; *Richardson v. Jones and Denton*, 1 Nev. 405.)

By the Court, GARBER, J. :

Ejectment for a mining claim. The testimony was conflicting. Defendants having obtained a verdict, the plaintiff moved for a new trial, on the ground, among others, of misconduct of some of the jury and of the prevailing party. The motion was overruled, and from the order denying it and the judgment on the verdict, this appeal is taken.

The motion was supported by affidavits on behalf of the plaintiff, showing that during the time the action was on trial and before the jury retired to deliberate, the jurors, while under charge of an officer for the purpose of viewing the ground, went into a saloon and there drank liquors at the expense of the defendant Showers; that one of the jurors offered to pay for the drinks, but was not allowed to do so by Showers, who volunteered to pay for them; that during the noon recess on the last day of the trial, one Apple-

ton, who had previously been seen in company with Showers, went into a store where Sperling, one of the jurors, was employed; that he was followed into the store by one of the affiants, Handley; that when Handley entered the store, Sperling, who was alone in the front room, came toward the front portion of the store where Handley was, and at that time Handley saw Appleton writing at a desk in the back room; that soon afterward Appleton came out of the back room and Sperling turned and met him about the center of the front room, when Appleton held up a piece of paper before Sperling, who seemed to read it; that a brief conversation took place, and Appleton then left and passed down the street until he approached a building against which Showers was leaning; that as Appleton drew near, Showers left the place where he had been standing and met Appleton about the middle of the street; that they then started up the street, walking closely together and conversing, and were soon joined by Steele, another of the defendants, and the three passed up the street talking amongst themselves out of the hearing of others, Showers exhibiting signs of pleasure; that Handley was in the habit of making the store his place of spending his leisure hours, but had never before seen Appleton there.

The only counter affidavits are those of Showers and Appleton. Showers deposes that the jury entered the saloon after examining the ground, of their own motion; and after having entered it, the officer in charge asked them to drink; that some of the jurors took beer and some cigars; that none drank more than once, and then nothing strong, and none were affected by the liquor; that after drinking, and while the jurors were leaving the saloon, he, Showers, proposed to the officer to pay for the drinks and cigars, and thereupon did pay for some of them, a member of the jury paying for the residue; that he had no further or other connection with the matter set forth in plaintiffs' affidavits so far as the same relate to the drinking of the jury at said saloon.

Appleton deposes that he is acquainted with Sperling; that at no time during the trial, or while Sperling was acting as a juror in this cause, or between the impanneling of the jury and the rendition of the verdict, did he have any conversation with or hold any

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communication with said Sperling, or any other, with reference to said cause, or in any way intermeddle therewith, or attempt to influence the verdict of the jury therein.

Respondents contend that at common law, eating, drinking and the like, at the expense of the prevailing party, avoid the verdict only when occurring after the jury have left the bar and retired to their room to deliberate, and that the rule has been so far modified by modern cases as not to apply where the civilities and attentions paid to the jury are inadvertent, or such only as are called for by the ordinary proprieties of life; that they must be, to vitiate the verdict, of an unusual character, or so tendered as to induce the belief that they operated prejudicially to the losing party. As to the common law rule, we take the following extracts from books of recognized authority. "If the jury, after their evidence given unto them at the bar, at their own charges eat or drink, either before or after they be agreed upon the verdict, it is finable; but it shall not avoid the verdict; but if, before they be agreed on their verdict, they eat or drink at the charge of the plaintiff, if the verdict be given for him, it shall avoid the verdict; but if it be given for the defendant, it shall not avoid it, etc., and *sic e converso*. If the plaintiff, after evidence given and the jury departed from the bar, or any for him, do deliver any letter from the plaintiff to any of the jury concerning the matter in issue, or any evidence, or any escrow touching the matter in issue, which was not given in evidence, it shall avoid the verdict, if it be found for the plaintiff, etc." Coke, 227 (b), (e).

"If *any one* of the jury eat or drink without license of the Court, before they have given up their verdict, they are finable for it. * * * If it be at the charge, for the purpose of the prisoner, and they find him not guilty, the verdict shall be set aside." Hale, 2 P. C. 306.

"If the jury eat and drink at the cost of a party, after they are gone from the bar, and before they are agreed, their verdict shall not be received, if the verdict be for the same party that gave the meat and drink, *for this induces affection*. But if they eat and drink at their own costs, by assent of their keepers, it being brought by the keepers, it shall not avoid the verdict." 21 Viner's Abr. 448.

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"I take not the law of the realm to be that the jury, *after they be sworn*, may not eat or drink till they be *agreed* of the verdict; but truth it is, there is a maxim and an old custom in the law, that they shall not eat nor drink *after they be sworn*, till they have given their verdict, without the assent and license of the justices. And that is ordained for eschewing of divers inconveniences that might ensue thereupon, *and that specially* if they should eat or drink at the cost of the parties; and therefore, if they do the contrary, it may be laid in an arrest of the judgment." Doctor and Student, 271.

In 1 Graham & Waterman, 99, it is laid down: "That eating and drinking at the expense of the prevailing party has always been held to vitiate the verdict;" but in the cases cited, the eating and drinking occurred after the jury had retired to deliberate.

In Co. Litt. 156, (b) 157 (b), after defining a principal challenge as so called because, if it be found true, it standeth sufficient of itself, without leaving anything to the conscience or discretion of the triors, it is said: "If any after he be returned do eat and drink at the charge of either party, it is a principal cause of challenge." But, in *Morris v. Vivian*, 10 Meeson & Welsly, 137, at an adjournment for the night, after the jury were sworn, but before the summing up, two of the jury dined and slept at the house of the prevailing party. The counsel for the failing party, on moving for a new trial, stated that neither he nor his client believed that either of the jurors had been influenced in the slightest degree by the hospitality in question, and that he was instructed expressly to disclaim any such imputation. The motion was denied. The Court declined to lay down any rule for cases where suspicion of bias or unfairness could possibly attach; but treated the granting or refusing the motion as in the discretion of the Court, where there was confessedly no ground for such suspicion. They said there was no positive peremptory rule compelling them to set aside the verdict under such circumstances; that the English authorities above cited only show that where all that remains for a jury to do is to deliberate upon and give their verdict, if they eat and drink at their own expense, they may be fined; and if at the expense of the party for whom their verdict is given, it is void; and only apply

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to the whole jury and to acts done by them, after they retire to deliberate. They further say: "It is quite clear that, in this case, they could not have been fined for eating and drinking at their own expense, and it is not seen that they fall within the other branch of the rule."

We cannot accede to this reasoning. With us, the granting or refusing a new trial is not a matter of discretion. It may be clear that in 1842, when *Morris v. Vivian* was decided, the jurors in that case could not have been fined for eating and drinking at their own expense during the adjournment; but it by no means follows that their eating or drinking at the expense of the prevailing party was not fatal to the verdict. At that period it was settled that where the length of the trial rendered it necessary, the cause might be adjourned, and the jury allowed to separate for the purpose of refreshment and repose; and the assent of the judge to the eating at their own expense was implied by his allowing them to separate for such purposes; and Coke, in saying they might be fined, must be understood to speak of eating and drinking without such assent, for before his time it had been adjudged that they might lawfully eat and drink, at their own cost, by permission of the Court.

In 1819, in deciding that the jury may disperse at adjournments, this distinction was taken, the Court saying, that "if they separate without the consent or approbation of the judge, express or implied, it may be a misdemeanor in them and they may be punished." (1 Chitty, 401.) Even if, in 1842, the restriction against eating at their own cost being originally preventive mainly of delay, and from an early period dispensable at the will of the Court, had become obsolete, this furnishes no argument against the existence of the part of the rule intended to guard against corruption, and which no Court was ever authorized to dispense with.

Again, the same reason which forbids treating all, forbids treating any—and Hale says, as we have seen, "If *any one* eat, etc."

Coke, it is true, speaks of several things as finable or fatal to the verdict, in the same connection, viz: "after their evidence given," or "after their departure from the bar," etc. But the passage obviously applies to some of these things when occurring at any period of the trial: for example, delivering letters, etc., to a jury, as to

which Hale says: "If the prevailing party or any in his behalf, say to a jurymen *after his departure from the bar*, and before verdict given, the case is clear for the plaintiff; this will avoid the verdict if given for the plaintiff, for it is new evidence. But not if *after the jury are sworn* he speaks with a jurymen, but nothing touching the business at issue." (2 P. C. 307.) Showing that the expressions, "after their evidence given,"—"after their departure" and "after the jury are sworn," were used by these authors as conveying the same meaning. So in the passage from Doctor and Student, written in the reign of Henry VIII: "They shall not eat or drink after they be sworn, etc."

But even if Coke had more particularly in view acts done after the jury retired to deliberate, it is not pretended that he ever laid down any other or different rule as to acts occurring before that stage of the trial, and there remains the pointed and direct expression of the common law rule, cited from Hale and St. Germain.

That Coke should use language thus restricted does not seem remarkable, if we consider that issues were then generally determined at one sitting, the jurors always attended by bailiffs, and that perhaps no case had occurred of an adjournment before the close of the testimony. As late as 1796, the Court having sat thirteen hours without any refreshments, Lord Kenyon adjourned till next morning, observing that necessity justified what it compelled, and that though it was left to modern times to bring forth cases of such extraordinary length, no rule could compel them to continue sitting longer than their natural powers would endure. In citing this case in *Graham & Waterman*, it is said that it was originally thought a great and dangerous innovation to suffer the jury, upon a capital trial, to depart from the bar of the Court during a temporary adjournment, even though kept under care of sworn officers; and in Coke's time no distinction was made between civil and criminal cases in this regard. (*State v. Miller, infra.*) The jury was considered as *charged* with the cause as soon as empanelled and sworn. (4 Taunton, 311.) He may then have contented himself with laying down the rule in terms sufficiently broad to comprehend any case likely to arise. But, the reason being the same, the law should be the same, and the object of the rule is to prevent

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that which induces favor. Now what possible difference can it make whether the eating, etc., at the expense of the party take place after the jury are sworn and before they retire to deliberate, or while they are deliberating? Until the juror was accepted and sworn, either party might challenge him, and so might protect himself from the influence of all such civilities occurring theretofore. But after he was sworn, the only remedy was by granting a new trial, if the juror had been tampered with. The passage cited from Coke as to challenges is conclusive. Treating a juror after he is returned is made a principal cause for challenge—of itself, without more, disqualifies.

Clearly then, the time when the treating occurred was immaterial, if at any time after such return—after a small body of men has been selected from the community, and so rendered liable to this kind of solicitation and approach. The policy of the law was to prohibit this kind of treating at any time after such selection, and this policy was enforced by the right of challenge when the treating occurred before empannelment, and the right to a new trial where it occurred too late for a challenge to be availed of.

We think, then, that at common law all the rules designed to secure the purity of trial by jury applied from the moment the jury was sworn till the verdict was agreed upon. Very anciently, it is possible they could neither separate, eat or drink during that interval; but if the rule ever existed in such extreme severity, it was flexible, and carried within itself an implication of such exceptions as were necessary to its practical working. It was soon agreed that they might separate in case of pressing danger without the leave of the Court; (1 Cowen, 222, note) that they could eat and drink at their own cost, in the presence and with the assent of the Court, (20 Henry, 7, 3, 6) and in the same reign, "that if the thing wherein the jury misdemean themselves is by the act of the party who has the benefit of the verdict, there shall be a new trial, otherwise the jury only shall be fined", (15 Henry, 7, 1, 6): next, that the Court could adjourn if the trial could not be finished at one sitting, still keeping the jury in charge; and lastly, that during adjournments in civil cases and misdemeanors, the jury might be allowed to disperse.

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But so much of the common law as was essential to its wise policy in this behalf, and consistent with the practical administration of justice under the changed conditions wrought by advancing civilization, remains in full force, and must so remain until abrogated by legislative enactment. That policy was to obtain twelve impartial and competent jurors, and after their selection to keep them so, by securing them as far as might be from the possibility of improper intercourse or undue influence.

Eating and drinking, if not at the charge of either party, and adjourning for refreshments and repose, are safely—as not even tending towards partiality or favor—and necessarily—as required by the length of modern trials—allowed. Dispersing at such adjournments has also been considered permissible on similar, but more questionable grounds; the necessity only consisting of a great convenience, and the license being liable to abuse; and consequently our statute has practically restored the common law in this respect. The very reasons resorted to, to sustain the innovation thus condemned by our statute, are pregnant with a strong argument against the propriety of that sanctioned in *Morris v. Vivian*. It was argued that although public as well as private interests would be promoted by now, as anciently, suffering no unattended departure from the bar, yet that issues now, instead of being determined at once, or in a few hours, take days and even weeks; that as it is necessary to adjourn, it is also necessary for jurors to look after their private affairs, etc.: but to permit eating and drinking at the expense of the prevailing party is now, as it ever was, impolitic, unsafe and unnecessary. The weak and facile may be influenced by such attentions, and though it appears in a given case that none have been influenced, still the practice breeds suspicion and dislike of a mode of trial most admirable and useful if it attain and deserve the confidence and respect of the public—worse than useless if it fail of either such attainment or desert.

We think it is shown that whenever that is properly adjudged lawful which, according to the rigor of the ancient law, was unlawful, there have concurred, a real or supposed necessity a consequent power in the Court to license the act, and the express or implied consent of the Court to the doing of it. Neither of these es-

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amentals can be predicated of the act here in question. It was, then, irregular and unlawful.

Being also "the act of the party who has the benefit of the verdict," and he himself having caused the irregularity, public policy requires that the verdict, however right, should be forfeited. (*State v. Miller, infra.; Com. v. Roby*, 11 Pick. 519.)

We find in the American cases nothing to shake our confidence in the correctness of this view, but rather confirmation of it. It is true, the precise point that the treating by the party before the jury retire to deliberate is fatal to the verdict, was actually *decided* in none of the following cases, except those from Georgia; but in all of them, except that from Iowa, the misconduct alleged took place at adjournments before the close of the testimony. In *State v. Muller*, 1 Dev. & Bat. 508, the Court say it is laid down anciently that a jury once charged cannot be discharged before they render a verdict, nor can they separate, eat and drink without license from the Court. This we find as a general proposition, without any qualification as to cases civil or criminal; or referring, except as to eating and drinking, to leave first granted by the Court. As regards the particular misconduct of eating or drinking, it has been settled ever since 14 Henry, 7, that unless it be at the charges of the party it avoids not the verdict. So Judge Bronson, 1 Hill, 207: "I cannot think it sufficient ground for setting aside the verdict, unless there be some reason to suppose that the juror drank to excess, or at the expense or on the invitation of one of the parties." In *State v. Perry*, Busbee, 333, the Court say that if the jury had been fed at the charge of the party, they should not hesitate to grant a new trial. In *Springer v. State*, 34 Georgia, 379, one of the attorneys kept a juror home over night free of charge. P. C.: We are thoroughly persuaded that the counsel was solely actuated by generosity, and we credit the affidavits of the jurors that they were uninfluenced. So it was in the Hunter Will case; yet the verdict in favor of his client was set aside, because the attorney allowed a juror to dine at his table whilst the cause was being tried. For the same reason, we must direct a new trial in this case. The honor of the bar and the perfect purity of a jury alike demand their entire separation in their personal and social intercourse

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whilst trials are progressing. However harmless in themselves was the conduct of our respected brethren in these cases, we feel ourselves called upon in this, and in every case where this separation is not preserved with the utmost care, to evince our purpose to shut up every avenue through which corruption or the influence of friendship could possibly approach the jury box."

In *Ryan v. Harrow*, 27 Iowa, 500, the modern rule is thus stated: "If a juror has communications in regard to the cause with a party or an attorney therein; if he receives refreshments from a party to the suit, or is exposed to other temptations that might operate upon him to corrupt his verdict, the courts will not enter into an inquiry whether indeed such was the result; but, in the fear of possible improper influences wrought thereby, will set aside the verdict. Jurors of ordinary intelligence and firmness would not be influenced by these things; but it is safer to remove temptations entirely out of the reach of jurors, than by weighing them to determine whether in fact the pure fountain of justice has been corrupted. In *Thompson's Case*, 8 Grattan, 657, it was laid down that if refreshments, either eating or drinking, are furnished by the prevailing party, it is sufficient ground for setting aside the verdict; but it was decided that such treating by a witness for the party, if done inadvertently, in the presence of the officer, his credibility not being questioned, etc., is not sufficient ground. In the case of *Phillipsburg Bank v. Fulmer*, 31 N. J. 52, relied on by respondent, the Court say: "Considering the great importance of jealously guarding the jury against improper influences, and the reason there is to fear that the practice of thus endeavoring to procure a favorable verdict is becoming more and more prevalent and dangerous, enough suspicion has been thrown on the conduct of the defendant and his sons to make it our duty to interfere. It does not distinctly appear that there were private conversations with jurors on the subject of the cause; but it does appear that unusual civilities and attentions were paid to several of them, and they were treated more than once, and in such a manner as to render it in the highest degree probable that it was not done inadvertently and only so far as was called for by the ordinary proprieties of life, but for the express purpose of influencing the verdict. There

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is no danger that we shall err in requiring of the parties the most scrupulous care to avoid even the appearance of adopting undue means of insuring success."

Of course all this case *decides* is, that such misconduct as was there shown will vitiate the verdict; but it seems to intimate that the mere fact of treating inadvertently, &c., is not fatal. The opinion intimated is evidently based upon what was said by Judge Hornblower in an earlier case, (*Tomlin v. Cox*, 4 Har. 79) where the following passage occurs: "Since jurors have been permitted to separate during the progress of trials, Courts have sedulously endeavored to protect them from the out-door interference of parties and their coadjutors, by setting aside verdicts in all cases where such attempts have been made, without stopping to inquire whether they had any influence on the verdict or not. I am willing it should be understood to be the determination of the Court to set aside every verdict in a doubtful or contested case, if it can be ascertained that the prevailing party, by himself, his retainers or agents, has held any private conversation with a juror, out of Court, on the subject of the cause while it was on trial. I am almost willing to go further, and say that a verdict ought to be set aside if it can be shown that the prevailing party has manifested to a juror any unusual civilities or attentions: such as treating or entertaining him at his expense, or having any other communications with him during the progress of the trial, save such as is called for by the ordinary proprieties of life between fellow citizens when they accidentally meet." Most likely Judge Hornblower simply meant that a verdict should be set aside for treating or entertaining a juror, and that it should also be set aside for any other communication uncalled for by the ordinary proprieties of life. But however this may be, we prefer to follow the plain, simple rule of the common law. The rule, it is said, was adopted "to prevent the jury from being *tempted* to find a verdict against their unbiased sense of the right of the case, by motives of *gratitude* or of feeling for favors, *however slight*, conferred by either of the parties," (4 Wash. C. C. 34) and therefore the rule applies to any treating, of any of the jury, at any time after they are sworn, and before they agree upon their verdict; whether once or several

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times; by design or inadvertently, in the presence of the officer or in his absence; and whether we might deem it called or uncalled for by the proprieties of life. And there is no hardship or undue severity in this rule. If the prevailing party is put to the expense and vexation of a second trial, he can blame no one but himself. It is simply enjoined upon him to refrain from intermeddling with the jury; to keep aloof from them during the progress of the trial, and to see that his attorneys and agents do the same. In this particular case, which of the proprieties of life would have been violated if the defendant had so conducted—had suffered those who ordered and drank the liquor to pay for it? If this was inadvertent, what treating should be considered designed? But we do not feel called upon to enter into these nice distinctions, involving questions which must be decided, if at all, each upon its own circumstances, without the aid of any known guiding principle of law. Probably, even in cases of treating by design, it would be long before another case would arise in which the designing party would not come prepared with some at least plausible excuse for his act, or to show that it was only inadvertent, or called for by the ordinary proprieties of life.

As, for the act of Showers in treating the jury, the order appealed from must be reversed, it is unnecessary to decide the other questions raised. We do not wish, however, to be understood as sanctioning the practice of moving for a new trial upon affidavits made on information and belief. Doubtless the Court, if requested, would have compelled Piper to testify; and we think that, in all cases where tampering with the jurors or the like is suggested, the Court should lend a willing ear to an application to compel the attendance and thorough examination of all parties cognizant of the facts, (8 Abb. Pr. R. 141; *Richie v. Holbrooke*, 7 Serg. & Rawle, 457). Whether the plaintiff's affidavits make out a *prima facie* case in regard to the conduct of Appleton and the privity of Showers thereto need not be decided. (*Vide*, however, 2 Graham & W. 295.) But if they do, we doubt the sufficiency of the counter affidavits to rebut it. The affidavit of Showers artistically excludes any conclusion of a denial of complicity with Appleton, and that of Appleton is altogether too vague and general. If there

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was nothing wrong in his visit to the juror, and if Showers had nothing to do with it, as may be the facts, they could easily have given, in their affidavits, a full and satisfactory explanation. In cases where misconduct of this kind is charged, we think the counter affidavits should be full and explicit, and so state the particular facts and circumstances that if false, perjury could be assigned. It may be that so far as they relate to the alleged misconduct of Appleton, the counter affidavits were all that was called for by those of the plaintiff, but the alarming extent to which the practice of tampering with juries has been carried, may justify this intimation of our intention to apply the law in such cases with corresponding stringency. The judgment and order appealed from are reversed, and the cause remanded for a new trial.

JAMES G. FAIR, RESPONDENT, v. HENRY C. HOWARD
et als., APPELLANTS.

MORTGAGE FOR PRE-EXISTENT DEBT WHEN REGARDED AS BONA FIDE PURCHASER FOR VALUE. Where Howard was indebted to Fair, and executed to him a note for the debt, and a mortgage on certain real estate to secure the same: *Held*, that Fair, as to the land and mortgage, occupied the position of a *bona fide* purchaser for value; and that his right would prevail as against the equity of Armstrong, for whom Howard held half the land in trust, the declaration of which trust was, however, not put on record until after the mortgage.

POSSESSION OF LAND AS NOTICE OF TRUST IN IT—ESTOPPEL. Where Armstrong being the owner of land, deeded it to Howard by conveyance absolute on its face, but with an understanding that Howard was to hold one-half the land in trust for him; and after recording the conveyance, Armstrong remained in possession of the land: *Held*, that he was estopped from relying on his continuance in possession as notice of the trust.

APPEAL from the District Court of the First Judicial District, Storey County.

This was one of two actions commenced in 1868, against H. C. Howard, William R. Armstrong and others, to foreclose mortgages. The mortgage in this case was for the sum of ten thousand two hundred and forty-four dollars, upon the undivided half of the "Devil's

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Gate Toll Road," in Storey, Lyon and Ormsby Counties; and in addition to Howard and Armstrong, John Sime, B. F. Hastings, Joseph M. Douglass and Charles L. Low were made defendants. The other case was that of *Charles L. Low v. Henry C. Howard* and *William R. Armstrong*, on a mortgage for two notes of four thousand dollars each, on the undivided half of the property in Lyon County, known as the "Devil's Gate Hotel."

The points involved in the case of *Low v. Howard* and *Armstrong* were substantially the same as those here involved, and it was decided expressly on the authority of this case—the Court, Whitman, J., holding that the plaintiff "by reason of granting his debtor Howard an extension of time upon his indebtedness, became a *bona fide* purchaser for value, against whom the equity of Armstrong cannot prevail."

R. S. Mesick and *J. Seely*, for Appellants.

Williams & Bixler, for Respondent.

By GARBER, J. :

This is an action for the enforcement of the rights secured by a mortgage. The complaint alleges that on the nineteenth day of April, 1867, the defendant Howard made and delivered to the plaintiff his promissory note of that date, and at the same time, to secure its payment, executed a mortgage conveying to the plaintiff certain real estate described; that said mortgage was duly recorded; that defendant Armstrong and others claim an interest in the premises, subsequent to the mortgage lien, etc. Howard and Armstrong answered, setting up that one half of said mortgaged premises, at the time of the execution of the mortgage, belonged to Armstrong, the title being vested in Howard in trust for Armstrong; that plaintiff had notice of said trust, etc. A judgment was rendered, directing a sale of the premises for the payment of said note, and subordinating the claim of Armstrong to the lien of the mortgage. From this judgment and an order overruling a motion for a new trial, this appeal is taken.

The record discloses the following facts: In the year 1860, Howard acquired title to the premises; on the twentieth of August,

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1862, Howard conveyed the same to Armstrong; on the twenty-seventh of April, 1863, Armstrong, by deed absolute on its face and duly recorded, conveyed the property to Howard. At the time of the execution of this last-named deed, it was verbally agreed between Howard and Armstrong that one half of the interest so conveyed was to be absolutely the property of Howard, the other half to be held by him in trust for Armstrong, and to be conveyed to Armstrong on request. This trust vested in parol until the fourteenth day of May, 1868, when Howard, by deed in writing, declared the trust to exist, and to have existed since April, 1863. Armstrong was and remained in possession of the premises from a date prior to the deed of April, 1863, to the commencement of this action. Prior to, and at the time of, the execution of the mortgage, Howard was indebted to the plaintiff in the amount specified in the note. Howard requested time for the payment of this indebtedness; and after agreeing upon the rate of interest, the plaintiff consented to give the time and take said note and mortgage. The note was made in the State of California, and was made payable twelve months after date, bearing interest at the rate of one and one-half per cent. per month. It is not pretended that the plaintiff had any notice or knowledge of the existence of the trust set up by Armstrong, other than is to be inferred by law from the fact of Armstrong's possession. According to *Sime v. Howard*, 4 Nev. 473, Armstrong, as *cestui que trust*, was the equitable owner of one half of the property at the date of the mortgage.

Upon these facts the counsel for appellant contends in an able and elaborate argument, that the equity of Armstrong, as *cestui que trust*, was good as against Howard, and equally good against all persons except *bona fide* purchasers for value; that the plaintiff cannot be considered such a purchaser, because to have a defense against prior equities, one must be a purchaser in the technical sense of the common law, and must have acquired the legal title; that a mortgagee is not a purchaser at common law, and *a fortiori* not in this State where, it is contended, a mortgage does not pass the legal title; that this mortgage, even if a *quasi* conveyance, was not taken in good faith within the meaning of either the equitable or statutory rule concerning *bona fide* purchasers, to the extent

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that it is given on account of an antecedent debt ; that to constitute a consideration, valuable in the sense of sufficient, not for the negotiation of bills and notes but for postponing the prior equities of a *cestui que trust* in trust property, wrongfully mortgaged by the trustee for his own private ends, there must have been a new and specific payment or transfer of money or money's worth ; and that the forbearance of a sum of money due and payable cannot be considered as money, etc., so as to make the mortgage of any force against the prior equity ; and that even could it so avail, the mortgage would not bind the property for the debt forborne, but only for the price of the forbearance ; and that the effect of the mortgage in barring the statutory right of attachment is, if possible, of still less avail ; that though there is a conflict of authority as to what is sufficient consideration to impair prior equities in commercial paper, there is none in case of property ; that the early New York cases hold most nearly, in cases of paper, to the rule in property cases, and in the former disallow forbearance, or even payment, as consideration ; and assuming the equity rule to be that payment or extinguishment of a preëxisting debt is not a valuable consideration, it is argued that mere forbearance of such debt compensated for by the payment of adequate interest cannot be so considered, without abandonment of the whole reasoning by which the equity rule is supported. It is conceded, and is elementary law, that a *bona fide* purchaser for a valuable consideration, acquiring the legal title or estate from the trustee, will hold against the beneficiary ; but, denying that plaintiff is such purchaser, it is claimed that (Howard still holding the legal title) we must apply the equity doctrine, that where the legal title is so outstanding, it is held in trust to satisfy different equities in the order of their creation. (*Ex parte Knott*, 11 Vesey, Jr.)

It is clear that the plaintiff is a *bona fide* mortgagee, so far as the question of notice is concerned. By putting the conveyance to Howard on record ; Armstrong is estopped from relying on his continuance in possession as notice of the trust ; and under such circumstances the plaintiff was not bound to go beyond the declarations of Howard and Armstrong as publicly recorded, and inquire into the actual relations subsisting between them. This is the rule

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laid down in the notes to *LeNeve v. LeNeve*, 2 Leading Cases in Equity, 166, and any other would be unsafe and subversive of the policy of our registry laws. (*Bloomer v. Henderson*, 8 Michigan, 405, and cases cited.) Then, was there here a valuable consideration? The question is not whether the consideration is adequate, but whether it is valuable; for if it be such a consideration as will not be deemed fraudulent, or as will make the plaintiff a purchaser within the statute, (27 Eliz.) or is not merely nominal, or the purchase is such a one as would hinder a *puisne* purchase from overturning it, the consideration must be deemed valuable within the meaning of the rule protecting *bona fide* purchasers for value against antecedent equities. (1 Daniel's Ch. Pl. & Pr. 777; *Bassett v. Nosworthy*, 2 Leading Cases in Equity, 51.) Nor need the consideration be money—the giving up a right may suffice. (*Hill v. The Bishop of Exeter*, 2 Taunton, 82.)

Whether a mortgagee, who takes a mortgage as security for a preëxisting debt is such a purchaser within the statute, (27 Eliz.) has been doubted, and seems to be left an open question by the text writers. (Greenleaf's Cruise, Title 32, Deed, Ch. 28, Sec. 39 [note]; 2 Leading Cases in Equity, 103, *et seq.*) The analogous question, whether a promissory note indorsed over as collateral security for a preëxisting debt, before maturity and without notice, can be held discharged of the equities between the original parties, has given rise in the American Courts to great conflict of judicial decision, and has elicited opinions exhaustive of the argument. In the early New York cases, and those which have followed them, the reasoning is, that where the note is received for an antecedent debt, either as nominal payment or as a security for payment, without giving any new consideration, the receiver is not a holder for value; that the principle of protecting the *bona fide* holder of negotiable paper who has paid value for it, or who has relinquished some available security or valuable right on the credit thereof, is derived from the doctrines of the Courts of equity in other cases, where a purchaser has obtained the legal title without notice of the equitable right of a third person to the property; that it has been uniformly held by the Courts of equity, in such cases, that the purchaser who has obtained the legal title as a mere security for or

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payment of a preëxisting debt, without parting with anything of value, is not entitled to hold the property as against the prior equitable owner ; that in England the law is the same in cases of commercial paper as in Courts of equity in cases touching transfers of property ; that nothing being advanced or relinquished on the faith of the paper, the holder (if he lose it) remains in the same position he occupied before the paper was passed. (*Stalker v. McDonald*, 6 Hill, 93 ; *Coddington v. Bay*, 20 Johns. 636, and other cases cited by appellant.)

To this it is answered : That the holder foregoes the pursuit of his own debt and thus puts himself, for the time, in a different, and in law, a worse situation ; that the transaction possesses the two cardinal ingredients of a valuable consideration, viz : a detriment to the promisee, and an advantage to the promisor ; that the holder is not left in the same condition he was before, (if the note prove unproductive) having for the time forborne, and in such matters time is of the essence of the transaction ; that the creditor gives time, (more or less) but of necessity some time ; that it is scarcely supposable that one so taking security will not conduct differently on account of the security ; nor would the debtor part with the security, unless he expected more or less indulgence on account of giving it ; that the assumption that time is not in fact given, because it is not expressly agreed to be given, and that, therefore, the indorsee is not placed in a worse position, by letting in the latent equities than he would have occupied had he not received the note, is at variance with general experience, and disregards the only motives inducing the transaction—that forbearance is implied from the nature of the transaction ; that the creditor is lulled into quiet, and the familiar principle applies, that, as between two innocent parties, he must suffer who has done an act by which he has placed it in the power of a third person to defraud the other party ; that the rule is so settled in England (*Poirier v. Morris*, 2 El. & Bl. 89) ; that, as to the equities of the case, it is more equitable that the party who set the note afloat with all the marks of credit and currency upon its face, should suffer, than the one who has so taken it *bona fide* for a debt due ; and that the English courts of equity, where transfers of land are concerned, have recognized

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no such distinction as that claimed by Chancellor Walworth, between a preëxisting debt and a fresh loan or advance of money. (*Brush v. Scribner*, 11 Connecticut, 396; *Swift v. Tyson*, 16 Peters, 1; *Bank v. Carrington*, 5 Rhode Island, 515; *Blanchard v. Stevens*, 3 Cush. [Mass.] 162; *Gardner v. Gager*, 1 Allen, [Mass.] 502; *Le Breton v. Pierce*, 2 Allen, 14; *McCarty v. Roots*, 21 How. [U. S.] 432; *Smith v. Hiscock*, 14 Maine, 449; *Bank v. Chambers*, 11 Rich. [Law.] So. Car. 661; *Vallette v. Mason*, 1 Indiana, 288; *Gibson v. Conner*, 3 Kelly [Georgia] 47; *Allaire v. Hartshorne*, 1 Zab. [N. J.] 667; *Succession of Dohonde*, 21 Louisiana, Am. 4; *Savings, etc., v. Bates*, 8 Conn. 512; *Manning v. McClure*, 36 Illinois, 490; *Bank v. Vanderhorst*, 32 N. Y. 553; *Ib.* 596; *Pratt v. Coman*, 37 *Ib.* 443; *Brideport v. Welch*, 29 Connecticut, 475; *Robinson v. Smith*, 14 Cal. 98; *Atkinson v. Brooks*, 26 Vermont, 588.)

There is a direct issue between Chancellor Walworth, 6 Hill *supra*, and some of the judges delivering the opposing opinions above cited, as to what was English law on the point in dispute as to indorsements of paper; but the case of *Poirier v. Morris* leaves no doubt that the latter judges are correct in their statement. There is an equally pronounced contradiction between the statement of Chancellor Walworth in 6 Hill, and that of Chief Justice Williams in *Brush v. Scribner*, as to the English equity doctrine in cases of sales, etc., of land; and here also the English authorities seem to sustain the statement of Judge Williams, that in English equity, no distinction exists between a mortgage of lands to secure a preëxisting debt, and a mortgage or deed of lands in consideration of a present advance made on the faith of the apparent legal title of the vendor or mortgagor holding such title as trustee.

If the question discussed in the above cited cases were of the first impression, the reasoning of those following *Swift v. Tyson* would be, undoubtedly, the more convincing and persuasive; theirs "the plainer and better doctrine." Kent, 3 Com., and if, as seems the fact, *Stalker v. McDonald* was decided on a misapprehension of the rules of both English law and equity, the doctrine of *Swift v. Tyson* is sustained by precedent as well as upon principle. The decided and increasing preponderance of authority in this country

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is certainly in its favor; and there is no sufficient reason why the same doctrine should not apply in cases of transfers of property by the ostensible holder of the legal title. The above reasoning, by which the indorsee of paper is held entitled to protection, obviously applies to protect the innocent mortgagee of realty; and if the securing a preëxisting debt is a valuable consideration in the one case, it should be considered equally so in the other; and generally the analogy has been treated as perfect. Thus, in *Stalker v. McDonald*, Chancellor Walworth drew the doctrines to be applied to paper from what he conceived to be the equity doctrine as to real estate; and in *Dickenson v. Tillinghast*, 4 Paige Ch. 220—the leading American property case so much relied upon for appellants—the only authority he refers to is *Coddington v. Bay*, which he pronounces analogous to the case under his consideration, where a mortgagor, the mortgage not being recorded, conveyed the mortgaged premises in payment of a precedent debt. So Chief Justice Shaw, in *Chicopee Bank v. Chapin*, 8 Met. 43, after laying down the rule as to paper, says the same rule holds in regard to real estate. In another case of mortgage of realty, the Court says: “The analogy between the case of a person claiming the rights of a *bona fide* holder of negotiable paper, and a person claiming to be a subsequent purchaser for a valuable consideration, under the recording acts, is quite perfect, and there is no reason why the rule of law should not apply to them alike.” (*Pickett v. Baron*, 29 Barb. 508.) Where one received goods, in payment of a precedent debt, from a fraudulent vendee, it was held that he was a *bona fide* purchaser, on the authority of cases relating to promissory notes, the Court saying: “The question whether one is a *bona fide* purchaser for value must be decided in the same way, upon the same facts, whether he purchases one thing or another.” (*Shufeldt v. Pease*, 16 Wisconsin, 660; *Babcock v. Jordan*, 24 Indiana, 19; *Knox v. Hunt*, 18 Missouri, 174.)

In Mississippi, the Court say, in a case involving a sale of land by a trustee: “It is settled that satisfaction of a preëxisting debt makes a *bona fide* purchaser not affected by previous equities: this is the rule as regards negotiable securities, and no reason is per-

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ceived why it is not applicable to the purchase of lands. (*Love v. Taylor*, 26 Miss. 574.)

In *Wood v. Robinson*, 22 N. Y. 567, cited by appellant, it seems to be admitted that in case of property mortgaged to secure a precedent debt, if time is given, the mortgagee will become a *bona fide* purchaser for value, which expression in the statute is said to be derived from Courts of equity; and 1 Paige, 125, is relied on to show that a mortgagee for an old debt is not such a purchaser; but the cases cited in 1 Paige fail to sustain the proposition. We find, then, no warrant in the authorities for the contention of counsel, that "in cases of property as distinguished from commercial paper, the doctrine never was extended beyond the rule applied to cases of commercial paper in the earlier New York cases."

On the point of the disagreement between Chancellor Walworth and Justice Williams as to the true equity rule, the distinction recognised in the English Courts seems to be that stated in some of the recent American cases; that is, between a creditor obtaining a lien or elegit by operation of law *in invitum*, or the assignees of a bankrupt, on the one hand; and a creditor obtaining a lien, as by mortgage, resting in agreement or consent, and contracting for the title to a specific thing, on the other hand—the mortgagee taking what he contracts for: while a judgment or attaching creditor, or assignee in bankruptcy, coming in by the law, is only placed by the law in the shoes of the debtor. (*Field, &c. v. Stearns*, 42 Vermont, 112; *Kelly v. Mills*, 41 Mississippi, 273, in which last case the subject is very thoroughly investigated.)

The case of *Plumb v. Fluitt*, 2 Anstruther, 482, cited by Justice Williams, seems to be directly in point, and to have been always recognized as authority. That was a bill in chancery by one having an equitable mortgage by deposit of the title deeds, against a person who had taken a subsequent legal mortgage conveying the same premises as security for an antecedent debt. The bill was filed for a sale, and to restrain the defendant from proceeding at law to recover possession of the estate. The plaintiff contended that the defendant was not a purchaser in good faith, because he took his mortgage without getting the title deeds, and so was affected with constructive notice. It was held that, the legal estate

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being in the defendant, the question was whether the plaintiff could raise a trust upon his estate, so as to gain a priority for his own demand; and that it was fully settled that a deposit of title deeds, as a security for a debt, amounted to an equitable mortgage. In answering the objection that no man would advance money upon an estate without seeing the title deeds, unless with a fraudulent intention, Baron Eyre spoke of the difference between a consideration which was an old debt, and a sum advanced *de novo*, and said there was no such distinction established in equity; and though he expressed a wish to see it established, it was not, it seems, for the reason suggested by Judge Williams, but because he thought that fraud could with less propriety be imputed to the creditor taking what he could get to secure his debt, than to a purchaser thrusting himself into a purchase. (2 Leading Cases in Equity, 115.) The bill was dismissed, which could not have been unless the defendant was a *bona fide* purchaser for value. There was clearly no necessity for discussing the question of notice, on the hypothesis that defendant was not such a purchaser. This case is approved in 7 Bacon's Abr. 102, where it is said: "Although a deposit of title deeds for the security of a debt amounts to an equitable mortgage, yet if a creditor of the mortgagor, fearing his immediate insolvency, take a conveyance of the same estate without notice of the incumbrance, equity will not prevent him from availing himself of his legal estate."

Now it is settled that, so far as this question of prevailing against a mortgage taken to secure a preëxisting debt is concerned, an equitable mortgagee is viewed as a *cestui que trust*, and occupies the same ground as any other equitable claimant—as Armstrong does here. *Vide Whitworth v. Gaugain*, 3 Hare, 425, where the question was between an equitable mortgagee and subsequent judgment creditors in possession by *elegit*. It was decided in favor of the mortgagee, on the ground that his was a trust binding the estate except against *bona fide* purchasers; that it was immaterial whether the debts of the subsequent incumbrancers were contracted "on the view of the land" or not; but that the true distinction was between a party contracting for a specific thing, and a party taking a judgment giving him nothing more than a right to that which belongs

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to his debtor. So in *Lister v. Turner*, 5 Hare, 281, an equitable mortgagee, secured in part for a preëxisting debt, was held a purchaser under the statute 27 Eliz. *Plumb v. Fluitt* was recognized in *Meux v. Bell*, 1 Hare, 86, as deciding that a mortgage given to secure a preëxisting debt is for value. Treating the principle, that where the same equitable interest has been assigned by the assignor to different independent assignees, he who first gives notice of his title to the legal holder of the interest will acquire priority of right though his assignment be subsequent, if, at the time of taking it, he had no notice, and deciding that it is not necessary for him to make inquiry of the trustee, the Vice-Chancellor says: "The injury he sustains, and which gives him priority, is *ex post facto*. The notice which has the effect of inquiry is given either at the time the money is advanced or afterwards, and the only distinction between the two cases is a distinction between a party who advances money at the time of taking a security, and a party who takes a security for an antecedent debt. The credit which the *puisné* incumbrancer gives to the fund after the notice, is as good a consideration as that of any other creditor who takes a security for an antecedent debt, which is clearly sufficient. *Plumb v. Fluitt*."

So; the distinction between an old debt and a fresh advance is said to be one existing in fact, but not recognized in law. (Fisher on Mortgage, 463.) To the same purport—at least where time is given—is the language of Lord Eldon, in *Ex parte Knott*, 11 Vesey, 615. He says: "The assignees have contended that there is a difference between dealing originally for a mortgage, and a debt originally by simple contract, and afterwards continued upon the immediate credit of the land under a new contract; the creditor waiving his right of insisting upon his debt at present, provided his debtor will give a security upon the land." After distinguishing *Brace v. Duchess of Marlborough* as applying to a lien by operation of law, he proceeds: "But that is not the case of a creditor originally by simple contract, who thinks proper to say he will remain such no longer, but will have either payment or a pledge for his money; that is, for a continuance of the loan, he will have an interest in the land, and that only. The contract is changed.

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Before, he could call for immediate payment of what was due ; but after the mortgage he can only call for payment at the day upon which, by the contract, the money is to be paid : a situation altogether different in point of contract." If no time is given and if it cannot be implied, there is force in the argument of counsel in *Ex parte Knott* that it ought not to be required that the creditor should go through the useless ceremony of taking his debt from the debtor and paying it back again to him ; which would put the creditor in the situation of a purchaser. *Ex parte Knott* was a case involving the right to tack, and the right to tack is confined to a *bona fide* purchaser for a valuable consideration without notice. (Story Eq. Jur., Sec. 416.) But a simple contract, bond or mortgage creditor, who takes a mortgage to secure his original debt, is as much entitled to tack as a mortgage creditor from the beginning. (Fisher on Mortgage, 360.)

In *Bayley v. Greenleaf*, 7 Wheaton, 54, Chief Justice Marshall, taking the distinction between parties claiming by operation of law, and creditors contracting for a specific lien to secure their debts, decided that a vendor's lien could not prevail against a creditor, to secure whose debts the vendee had conveyed the premises to a trustee. He said : " The lien of the vendor, if in the nature of a trust, is a secret trust ; and although to be preferred to any other subsequent equal equity unconnected with a legal advantage, or equitable advantage, which gives a superior claim to the legal estate, will be postponed to a subsequent equal equity connected with such advantages. The vendor should reduce his lien to a mortgage so as to give notice to the world. If he does not, he is in some degree accessory to the fraud committed on the public by an act which exhibits the vendee as the complete owner of an estate on which he claims a secret lien."

This case was commented on and disapproved by Chief Justice Gibson, in *Twelves v. Williams*, 3 Wharton, 485, but for no reasons which impugn its correctness as applied to the case before us. Judge Gibson says : " I know of no case, in which the abstract existence of debts was held to be a valuable consideration for a transfer of property to trustees for distributive payment, except *Bayley v. Greenleaf*. But where the creditors are party to the

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deed, there is a clear valuable consideration in the forbearance of suit and mutual accommodation expressed by the terms or *implied by the nature of the transaction.*" *Bayley v. Greenleaf* has received the unqualified indorsement of Kent and Storey. (4 Kent's Comm. 154-176; 2 Story Equity. Jur., Sec. 1229.) It is also cited with approval in 1 Leading Cases in Equity, 371, *et seq.*, and in many cases there cited; and though a vendor's lien is there distinguished from a trust or equitable mortgage, there seems to be no sound or practical reason for the distinction, so far as the question whether the plaintiff in this case is a *bona fide* purchaser for value is concerned; and accordingly in *Kelly v. Mills, supra*, a vendor's lien was allowed to prevail against judgment creditors and others deriving rights by operation of law. Every reason adduced to prove that a vendor's lien should not prevail against a *bona fide* mortgagee for a preëxisting debt is as cogent against the enforcement of a parol trust like Armstrong's, or any other secret equity, against such a mortgagee; and that a vendor's lien will not so prevail seems well sustained by authority. (1 Leading Cases in Equity, 235, 336, 371, notes to *Mackreth v. Symmons.*) In the principal case, Lord Eldon said, in alluding to the argument that the money was not lent on the faith of the land: "There is a great difference between the effect of a judgment as attaching upon the land, and a special agreement by a creditor for a security upon the land."• *Vide. Kelly v. Mills, supra*, as to opinions of Kent and Storey on this point.

In a case where goods fraudulently obtained were mortgaged by the vendee to secure a preëxisting debt, no time being given, the mortgagee was held to be a *bona fide* purchaser for value, and the conclusion said to be supported by justice and policy and analogous principles. (*Gibson v. Moore*, 7 B. Monroe, 95.) In *Potts v. Blackwell*, 4 Jones Eq. [N. C.] 68, the Court say: "A deed in trust executed *bona fide* for the security of actual creditors, whether for debts old or new, must be regarded as a conveyance for value, under the statute, 27 Eliz.: and a mortgage has always been considered as standing on the same footing as a deed in trust." In *Birdseye v. Ray*, 4 Hill. 163, the Supreme Court of New York, composed of Judges Nelson, Bronson, and Cowen, held that a

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bona fide preëxisting debt constitutes a valuable consideration; and though the Court of Errors, in 5 Denio, held differently, the authorities cited seem either inapplicable, or cases relating to parties coming in by operation of law. See also, to same effect as *Potts v. Blackwell*, *Babcock v. Jordan*, 24 Indiana; *Alexander v. Ghiselin*, 5 Gill. [Md.] 186, and cases in notes to *Mackreth v. Symmons*, *supra*. The cases cited to the contrary, by appellant, seem to have been decided solely on the authority of *Dickerson v. Tillinghast*, and the early New York cases relating to commercial paper, and must stand or fall with them. Few questions in the English Courts have been more thoroughly discussed or maturely considered than those raised in *Whitworth v. Gaugain*. When the case was first heard, it came before Lord Cottenham, and he expressed himself strongly in favor of sustaining the claims of the creditors against the equitable mortgagee. It next came before Vice-Chancellor, Wigram, who, as we have seen, and after an elaborate discussion, held in favor of the mortgagee, and his decision was affirmed on appeal. (1 Phillips.) Before the question was finally settled, it was fully reviewed by the text writers. (Miller's Law of Equitable Mortgages, 148.) But nowhere do we find even an intimation of the doctrine of *Dickerson v. Tillinghast*. If such had existed anywhere in English equity, is it possible that it could have escaped the notice of such masters of that branch of jurisprudence as those who treated the case of *Whitworth v. Gaugain*? And had it existed, it would have at once ended the controversy—for a judgment creditor certainly does not put himself in a worse situation by giving time—he simply, by availing himself of the law, secures his debt.

In the case before us there is, however, no necessity for resorting to any *presumption* of forbearance, or for implying it from the nature of the transaction. The note was made payable twelve months after date, thereby suspending the plaintiff's right of action on the debt until the maturity of the note. (*Pratt v. Ceman*, 37 N. Y. 442.) If we can rely on the analogy of the rule concerning commercial paper, all the cases, those of New York included, concur that if the party receiving the note parts with anything valuable he is not subject to equities, and that forbearance under a binding

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agreement to forbear is parting with something valuable. (*Blanchard v. Stevens*, 3 Cushing, 168 ; *Nagle v. Lyman*, 14 Cal. 455.) And if we cannot rely on that analogy, still the forbearance brings the case broadly within the reasoning of Lord Eldon in *Ex parte Knott*, Chief Justice Gibson in *Twelves v. Williams*, and many of the other cases above cited.

Then, is the plaintiff clothed with the legal estate within the rule protecting *bona fide* purchasers in equity ? It will not be denied that in an English Court of Chancery he would be so considered. (*Colyer v. Finch*, 5 House of Lords Cases, 905.) The English equity doctrine is thus stated by Spence (2 Eq. Jur. 648 ; 1 Ib. 599-604) : " Whether the mortgagor be in possession or not, he is considered until foreclosure, excepting where the interests of the mortgagee may be affected, as substantially—as according to the Roman law he was actually—the owner of the estate. The estate of the mortgagee is considered for almost all purposes as personal estate ; the equity of redemption as an estate in the land." That is, Courts of Equity—looking at the substance and disregarding the form—consider that the title passes only so far as is necessary to effectuate the real purpose of the parties, and to give to the mortgagee the full benefit and protection of the security ; the mortgage passes the legal title to the extent that it is necessary such title should pass in order to enable the mortgagee to realise the full fruition of the contract, the object of which is to bind the land absolutely to the payment of the debt ; consequently the mortgagee could bring ejectment, for the reason given that " in order to render his pledge available and give him the intended benefit of his security, he was necessarily indulged with this, the only instrument by which he could obtain possession of the land mortgaged." This right has been taken away by our statute, and for that purpose or to afford that remedy the legal title no longer passes in this State. But in other respects the rule is unchanged, and in the language of one of the cases, " The mortgage is a potential conveyance of the legal estate ; and whenever the mortgagee sees fit to make that election, the mortgage becomes in his hands a conveyance of the legal estate for all purposes necessary to the protection of his interest, and to enable him to avail himself

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of the security." (*Rigney v. Lovejoy*, 13 N. H. 252; *Great Fall Co. v. Worster*, 15 N. H. 444; *Smith v. Moore*, 11 N. H. 61; *Ib.* 221; *Hutchings v. King*, 1 *Wallace*, [U. S.] 57; *Presbyterian ch. v. Wallace*, 3 *Rawle*, 130; *Clark v. Beach*, 6 *Conn.* 163; *Ewen v. Hobbs*, 5 *Met.* [Mass.] 3.)

To consider the plaintiff the owner in fee for the purposes of this case, is to carry out what *Shaw, C. J.*, in *Ewen v. Hobbs*, says are the two great objects of a mortgage: First, in the form of a conveyance in fee is given to the mortgagee an effectual security. Second, there is left to the mortgagor, and to purchasers, creditors, and all others claiming direct through him, the full and entire control, disposition and ownership of the estate, subject only to the paramount purpose, that of securing the mortgagee. It cannot be objected that the plaintiff is himself asking relief in equity, because "for the purpose of the question whether a Court of Equity will interfere against a purchaser for a valuable consideration without notice, a foreclosure is not relief at all." (*Colyer v. Finch*, 2 *Leading Cases in Equity*, 59, 14.) *Armstrong* occupies the position of the plaintiff in *Plumb v. Fluitt*, seeking equitable relief, viz: the enforcement of his trust against a *bona fide* purchaser.

That the plaintiff is a purchaser within the meaning of and protected by the recording acts and Statute 27 *Eliz.*, is well settled. (*James v. Morey*, 2 *Cowen*, 290; *Pierce v. Faunce*, 47 *Maine*, 514; *Porter v. Green*, 4 *Iowa*, 571; *Martin v. Jackson*, 27 *Penn.* 504; *Gere v. Cushing*, 5 *Bush*, [Ky.] 304; *Snyder v. Hett*, 2 *Dana*, 204; *Ledyard v. Butler*, 9 *Paige*, 136; *Chapman v. Emery*, *Cowper*, 280.)

The judgment and order appealed from should be affirmed, and it is so ordered.

By LEWIS, C. J., and WHITMAN, J.:

Without indorsing the proposition that a mortgagee for an antecedent debt occupies the position of a *bona fide* purchaser for value, we concur in the opinion of Justice Garber.

The State of Nevada v. Chapman.

THE STATE OF NEVADA, RESPONDENT. v. J. E. CHAPMAN, APPELLANT.

CRIMINAL LAW—EVIDENCE TO CORROBORATE ACCOMPLICE. Where on appeal in a criminal case it was claimed that certain evidence given for the purpose of corroborating that of an accomplice was not sufficient: *Held*, that the question before the Supreme Court was not as to the weight of the evidence, but as to whether it was corroborative within the meaning of Sec. 385 of the Criminal Practice Act.

INDICTMENT—COUNTS SETTING OUT OFFENSE IN DIFFERENT FORMS. Where an indictment for robbery contained two counts, the only difference being that one charged the property taken as that of Wells, Fargo & Co, and the other as that of their messenger in custody thereof at the time: *Held*, authorized under Sec. 238 of the Criminal Practice Act, and not amenable to the objection of charging more than one offense.

WAIVER OF OBJECTIONS TO AFFIDAVITS FOR CONTINUANCE. Where in a criminal case, on motion for continuance on the ground of absence of witnesses, no objection was made that the affidavits did not set forth the materiality of their testimony; but it appeared that the Court assumed its materiality: *Held*, that it would be unfair to allow the objection to be made for the first time in the Supreme Court.

CONTINUANCE WITHIN DISCRETION OF COURT. A continuance in a criminal case is within the discretion of the court, and unless there is an abuse of its discretion, its action will be sustained.

DILIGENCE TO PROCURE CONTINUANCE. Affidavits for continuance in a criminal case on account of the absence of witnesses for defense should show diligence in attempting to procure their attendance, that at least reasonable means had been taken to ascertain their whereabouts, and that there was some reasonable probability that their attendance could be procured within a proper time.

CHALLENGE TO JUROR MUST SPECIFY GROUNDS. Where the only specification of ground of challenge to a juror was "for cause": *Held*, entirely insufficient, and that on appeal no objection would be entertained.

ACCESSORY BEFORE THE FACT SAME AS PRINCIPAL. An accessory before the fact to a crime, though not present and in fact out of the State at its commission, may under our statutes (Stats. 1861, 57, Sec. 10; 462, Sec. 252,) be charged in an indictment, and tried, convicted and sentenced in all respects as a principal.

ROBBERY BY ABSENT PERSON. Where several persons combined to rob Wells, Fargo & Co's stage, in Washoe County; and one named Chapman, in pursuance of the combination, went to San Francisco and telegraphed when a large amount of money would be on the stage, and the others did the robbery: *Held*, that Chapman was an accessory before the fact, and as such properly charged and convicted with the others as having committed the robbery in Washoe County.

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VENUE IN TRIAL OF ACCESSORY. There seems to be an incongruity between Sec. 91 of the Criminal Practice Act, which requires an accessory before the fact to be tried where his offense is committed, and Sec. 252, which places him on the same plane with the principal; but the former clearly does not apply in a case where the acts of the accessory are done out of the State.

DOCTRINE OF AGENCY AS TO ACCESSORIES BEFORE THE FACT. An accessory before the fact aiding, abetting or counselling a crime, is, under our laws, to be treated as a principal; in the same manner as in the civil law what a principal does by an agent he is to be regarded as doing by himself.

INDICTMENT AGAINST ACCESSORY BEFORE THE FACT. In an indictment against an accessory before the fact, it is not necessary to state the special act which the accused may have done in active or passive aid of the ultimate act; but only the ultimate act itself, the same as in case of a principal.

APPEAL from the District Court of the Second Judicial District, Washoe County.

The defendant, after his conviction, was sentenced to imprisonment in the State Prison for the term of eighteen years.

The charging part of the indictment, which is commended in the following opinion, was as follows: "That A. J. Davis, E. B. Parsons, J. C. Roberts, James Gilchrist, Tilton Cockerell, R. A. Jones, J. E. Chapman and John Squires, on the fifth day of November, A.D. 1870, and before the finding of this indictment, at Washoe County, in the State of Nevada, in and upon one Frank C. Minshull, express messenger of Wells, Fargo & Co, a corporation organized under the laws of the Territory of Colorado and doing business in the State of Nevada, did then and there willfully, feloniously, and violently make an assault, and him, the said Frank C. Minshull, express messenger as aforesaid, in bodily fear and danger of his life willfully, feloniously and violently did put; and gold and silver pieces, coins of the United States of the denominations of twenties, tens and five dollar pieces and fifty-cent pieces, and of the aggregate value of forty-one thousand, four hundred and thirty-five dollars of the moneys belonging to said Wells, Fargo & Co., a corporation organized under the laws of the Territory of Colorado, from the person and against the will of the said Frank C. Minshull, express messenger as aforesaid, and without the consent of Wells, Fargo & Co. aforesaid, then and there willfully, feloniously and violently did steal, take and carry away; contrary to the form of the

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statute in such case made and provided, and against the peace and dignity of the State of Nevada."

Thomas E. Haydon, for Appellant.

I. All of the acts attempted to be proven against Chapman constitute no public offense under the laws of this State ; all his acts being those of an accessory before the fact, and all having transpired in the State of California. (*The State v. Wyckoff*, 2d Vroom, 31 N. J., 68 ; *State v. Moore*, 6th Foster, N. H., 451 ; *State v. Knight*, 1 Taylor, 3 N. C., 44.

II. A person guilty only as an accessory must be specially charged as such, and cannot be convicted as a principal. (*People v. Campbell*, October Term, 1870, Cal. ; *People v. Trim*, Jan. Term, 1870, Cal. ; *People v. Swartz*, 32 Cal. 160 ; 1 Chitty, Crim. Law, 271 ; Wharton's Precedents of Indictments, 97 ; *State v. Snow*, 4 Dutcher, 519.)

III. The Court should have granted the continuance. (*People v. Dodge*, 28 Cal. 449.)

IV. The evidence of the accomplice Jones was entirely uncorroborated on the only points that attached any criminality to Chapman : first, on his agreement to the conspiracy and knowledge that any robbery was to be committed ; second, that there was any criminal covert meaning to an apparently innocent telegram.

V. An accessory is to be punished in the county where his offense was committed, notwithstanding that the principal offense was committed in another county. (Stats. 1861, 445, Sec. 91.) It is therefore necessary that the acts or facts of the accessory's participation should be shown, in order that it may be known in what county he should be tried ; hence, it appears that the Legislature did not intend to abolish all distinction between principals and accessories, nor to subvert the fundamental rule that the indictment shall contain " a statement of the acts constituting the offense in ordinary and concise language."

VI. The robbery was not committed through any innocent or guilty agent of Chapman, nor by any other means proceeding directly

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from him ; his part of the agreement was merely to advise Davis, Cockerell and Jones when, by *committing* the offense, they could acquire a large *booty*. The most that can be said is, that while not present, but absent in California, he *advised* and *encouraged* Davis, Cockerell and Jones to commit the offense by advising them of its probable profitable results. He was at most an accessory before the fact out of the State ; and as our law has not prescribed it any offense for any *accessory* out of the jurisdiction of this State to *advise and encourage* the commission of an offense within the State, the conviction cannot stand.

Robert M. Clarke, for Respondent.

I. The affidavit for continuance was insufficient, and no abuse of discretion being shown, none will be presumed. The affidavit did not show the materiality of the witnesses, nor the exercise of legal diligence to procure their attendance. It was not diligence to issue subpoenas for witnesses residing beyond the reach of process ; nor was it diligence to write Dr. Egery or Mrs. Sutton as to whereabouts of persons without writing the persons themselves ; nor did it appear where the witnesses were, nor whether defendant would be able to produce them. (33 Cal. 641.)

II. Defendant was properly indicted and tried where the crime was committed, notwithstanding his absence in California at the time. (31 Cal. 114 ; 1 Wheaton, Sec. 115, 154, 278 ; 3 Denio, 190, 206, 610 ; 7 S. & R. 469, 477 ; 1 Comstock, 173 ; 22 Eng. Law & Eq. 607.)

III. The indictment was proper. At common law there are no accessories in treason or misdemeanor, and an indictment charging either offense is supported by proof that defendant counselled or advised, or aided and abetted in the commission of the crime. In this State, the distinction between principal and accessory before the fact in felony is abolished by statute ; and the rules of pleading and evidence applicable to treason and misdemeanor at common law are consequently applicable to felony.

IV. The California case of *People v. Campbell* is against the whole current of authority, and the reasoning by which the conclusion arrived at is attempted to be enforced is unsound.

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V. The offense is robbery. The acts constituting it are the "felonious and violent taking of money from the person of Frank C. Minshull," etc. These acts are stated in the indictment. It is generally sufficient to charge the acts or facts of the crime in the language of the statute. (1 Bishop Criminal Procedure, Sec. 359, and cases cited, note 1.)

By the Court, WHITMAN, J. :

The appellant was jointly indicted with others, and convicted of robbery. He alone appeals, upon various grounds, which will appear in the course of this opinion.

On the morning of the 5th November, 1870, the cars of the Central Pacific Railroad Company of California were stopped in Washoe County, in the State of Nevada, by the defendants named in the indictment other than the appellant, and the treasure-box of Wells, Fargo & Co. broken open and robbed of \$40,000. Appellant was not personally present ; but was in San Francisco, California, where, it is contended by the State, he had gone in pursuance of a previous agreement, to telegraph from thence to his co-defendants, or some of them, when a large freight of treasure started for the use of the mines at Virginia City, in the State of Nevada. One of these testifies fully on this point, and another to some extent ; but appellant claims that such evidence is uncorroborated, and that therefore a conviction was improperly had ; relying upon the statutory provision as follows :

"A conviction cannot be had upon the testimony of an accomplice, unless he be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense, or the circumstances thereof." (Stats. 1861, 473, Sec. 365.)

Upon review of the transcript, it appears that there was some evidence tending to corroborate the accomplices, as by statute required. Several witnesses, not defendants, thus testify. Roberts and Evans both place appellant in company with three of the defendants, (one of whom is the witness who gave full evidence of the agreement) at the time and place testified to, and Roberts in addition swears that the witness, accomplice, and appellant came in a wagon together. Newby swears that subsequent to the time

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above referred to, the appellant was in company with one Squiers, a defendant, in the night time, in San Francisco. Ladd testifies to the sending of a telegram as agreed by appellant, over an assumed name, to the accomplice witness. Arthurs says that the key to this telegram produced at the trial was in the handwriting of appellant. Burke and Edwards testify that appellant denied the sending of this telegram upon its exhibition to him, after his arrest. How much the weight of this evidence may be, is not for this Court to decide. It is evidence tending to the statutory corroboration; considered by the jury sufficient; and therefore the objection of appellant must fail.

The indictment charges the robbery in two counts, the only difference being, that in one the money is charged as being the property of Wells, Fargo & Co., and in the other it is laid in the messenger having at the time special custody thereof. This appellant insists is a charging of more than one offence in the same indictment. It would be difficult, if not impossible, to frame a better indictment than the one at bar. In these days of peculiar pleading, it is absolutely refreshing to read such an one. The criminal statute of this State permits the double count. "The indictment shall charge but one offense, but it may set forth that offense in different forms, under different counts." (Stats. 1861, 460, Sec. 238; *People vs. Thompson*, 28 Cal. 214.)

Appellant applied for a continuance, upon an affidavit in which he set forth that Joseph Steinhart, Samuel Brown, Dr. Wm. Jones, R.D. Sutton, one Gilmore, and one Reid, were all material witnesses, without whom he could not safely proceed to trial. Their evidence is not detailed, and the averment as to its materiality is, to say the least, weak; and it is consequently urged by respondent that the application was, or might have been, properly denied upon that ground; but it is evident from the record that the Court below assumed the materiality of the testimony, excused the appellant from stating the same at length, and decided the motion upon other points. To take a different course now would be unfair, and appellant might properly complain that he had been deceived, to his injury. To ascertain whether the ultimate ruling was correct, requires a further examination of the affidavit.

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Steinhart was produced upon the trial, and examined by appellant; so as to this witness no harm could have happened to him by the denial of his motion.

The application was made December 12th, 1870. Appellant states in his affidavit, "That in order to learn the whereabouts of said Reed and Gilmore, affiant wrote to Dr. A. J. Egery, on the twenty-eighth day of November, A. D. 1870; and that he and his counsel have made, as affiant knows of his own knowledge on his own part, and is informed and believes, on the part of his counsel, diligent inquiries for the present place of abode, or sojourn, of said Samuel Brown, ever since this case has been set for trial. * * That said Dr. Jones and A. D. Sutton reside in California; said Jones in San Francisco, and said Sutton in Nevada City, in California; that on the third day of December, A. D. 1870, affiant wrote to Mrs. A. D. Sutton, requesting the attendance of said A. D. Sutton at this trial; that on the eighth day of December, 1870, he caused subpoenas for all of the above named witnesses, and others his witnesses, to be placed in the hands of the sheriff of this county, and that after due diligence said sheriff did not find any of the above named witnesses in this county. That said Samuel Brown has been a resident of Washoe County for two years or more last past, until about June, A. D. 1870, when he went away temporarily, driving a team for Jerry Gantz, making a circuit with a circus company, intending to return this winter. That affiant saw said Samuel Brown on the morning of the seventh of November, A. D. 1870, in San Francisco, and for several days before that time; and he was talking and told affiant that he should return to Reno, Washoe County, and winter there with his acquaintances; but notwithstanding diligent inquiries, affiant has not been able to learn where said Brown is, from any of his acquaintances about Reno; and has not been able to learn of the present whereabouts of Jerry Gantz, who thus employed said Brown, though said Gantz has been daily expected back at Reno by his friends there. That said Brown was only temporarily sojourning at San Francisco. That said Reed has also left San Francisco, and also said Gilmore. That the latter was a resident of Pine Grove, in Esmeralda County; was waiting at San Francisco the prospecting of some mines in Placer

County, which if favorable he intended to winter there ; otherwise to return to Pine Grove, Nevada."

Now, unless the District Court abused its discretionary power in refusing the continuance, the ruling must be sustained. While, perhaps it might be held that the granting a continuance upon such a showing would not be such an abuse of discretion as to warrant a reversal of the order, still the argument that way is much stronger than its reverse. While the rights of a defendant are to be carefully guarded, still the State has rights also ; and to grant a continuance upon an affidavit like this one quoted, would be to go a long way toward trifling with justice.

The diligence shown is of the slightest. The subpoena to the sheriff was, under the circumstances, an unmeaning form ; and with regard to Reed and Gilmore, it may fairly be said that none is shown, as the writing to Dr. Egery amounts to nothing at best, and might perhaps be the very cause of their mysterious disappearance ; and why Mrs. Sutton should have been addressed rather than her husband, who was the person sought, is unexplained. But waiving the question of diligence, nothing appears in the affidavit from which the District Court could infer that the residences of the witnesses, or any of them, were known to the affiant ; or that there was a reasonable legal probability that their attendance could be had within any proper time ; indeed, the presumptions are all the other way.

There is no method of compelling the attendance, or taking the testimony of witnesses out of the State in criminal cases ; and it devolved upon the appellant herein to present some satisfactory showing that he had reason to believe his desired witnesses could be produced at some early day, before the Court would have been justified in granting him delay. (*People v. Francis*, 38 Cal. 183.) The continuance was therefore properly denied.

One Twaddle was examined as to his competency as a trial juror, and was challenged by appellant as the record shows, "for cause." There is no further specification of the ground of challenge, and it was overruled ; whether for this reason or not is immaterial. The challenge was entirely insufficient under the statute, and that fact relieves this Court from the consideration of the questions, whether

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the District Court decided and ruled upon the ground that the juror was not disqualified by reason of any of the statutory causes; and whether, so deciding, it was or was not correct. The disposal of these objections against the appellant clears the way for others going more entirely to matter of greater final importance.

The indictment charged all the defendants as principal actors. The evidence, if taken as true, proves the following state of facts, as to appellant: That in Sierra County, in California, on some day between the tenth and twenty-second days of October, 1870, he agreed with Jones, Davis and Cockerell, three of his co-defendants, that on or about the fourth day of November, then next to ensue, the express car of Wells, Fargo & Co. should be robbed of the treasure, about that time expected to be on it. That he would go to San Francisco, watch the office of Wells, Fargo & Co., and in an agreed cipher telegraph to Jones at Reno, in the State of Nevada, a point near where the robbery was to be attempted, when the large monthly shipment of coin for the use of the mines in Virginia City and vicinity should be made. That appellant sent the telegram which Jones received, and in connection with the other defendants, acted upon, and as has been before stated, on the morning of the fifth of November, 1870, robbed the express car of Wells, Fargo & Co., of forty thousand dollars. That on the ninth of the month last named, appellant was arrested at the Capital House, in Reno, the place where the telegram before referred to was agreed to be, and was, sent by him to Jones.

Appellant urges, first: "That any and all of the acts attempted to be proven against him constitute no public offense under the laws of this State, all his acts being those of an accessory before the fact, and all having transpired in the State of California." To support this proposition, cases are cited which would be in point and of great weight, had not the rule at common law been modified by the statute law of this State. "An accessory is he or she who stands by and aids, abets or assists; or who, not being present, aiding, abetting or assisting, hath advised and encouraged the perpetration of the crime; he or she who thus aids, abets or assists, advises or encourages, shall be deemed and considered as principal and punished accordingly." (Stats. 1861, 57, Sec. 10.) "No dis-

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tion shall exist between an accessory before the fact and a principal, or between principals in the first and second degree, in cases of felony; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense or aid and abet in its commission, though not present, shall hereafter be indicted, tried and punished as principals." (Stats. 1861, 462, Sec. 252.)

Now, by these statutes appellant and his co-defendants are placed upon the same plane. If the latter are guilty, so is he. If he cannot be punished, neither can they. He is to be deemed a principal actor. The act was committed in the State of Nevada; he is deemed and considered a participant therein, though not actually present, and is to be punished accordingly: he and all the others, co-defendants, each and every of them, committed the crime of robbery (if any was committed) in Washoe County, in the State of Nevada. Each and all are equal in guilt; each and all committed the same identical crime in grade and substance: so says the law by which this case must be governed. Here, this statute differs from the one disapproved in a case cited by counsel for appellant: there, the Legislature of North Carolina had passed an Act making the counterfeiting of the bank notes of that State by the residents of neighboring States, in such States, a crime against the State of North Carolina, and authorizing trial, conviction and punishment as if the offense had been committed within the limits of North Carolina; and the Court very properly held that the defendant in such a case could not be punished in North Carolina for an act not done there. (*State v. Knight*, 3 N. C. 45.)

Counsel for appellant refers also to this other section of the statute last quoted: "In the case of an accessory before or after the fact in the commission of a public offense, the jurisdiction shall be in the county where the offense of the accessory was committed, notwithstanding the principal offense was committed in another county"; (Stats. 1861, 445, Sec. 91) from which it is argued that it was not intended by the Legislature to abolish the common law between an accessory before the fact and a principal. There does appear to be some incongruity between the different sections cited; but the practical application of the last one quoted does not arise in

this case, and it is hardly worth while to spend time in the attempt to reconcile a conflict, if conflict there be, which may, perhaps, never in reality occur. Suffice it to say for the present, that the sections first hereinbefore quoted do apply to the case in hand, and are clear and conclusive upon the point under review.

Counsel contends in the second place, that "a person guilty only as an accessory must be specially charged as such, and cannot be convicted as a principal." It might be enough to say: admit the proposition, and it proves nothing material to the case; as the statutes of this State recognize no such criminal; but as the Supreme Court of California, upon identical statutes, have held differently, it will probably be more satisfactory to make a more thorough examination of the proposition. The other cases cited demand no attention, because based either upon the common law, or differing statutes. So to the California case. Say the Supreme Court of that State: "In the opinion delivered in this case at the present term, and in the case of the *People v. Trim*, decided at the last January term, we held that though an accessory before the fact, under the statutes of this State, may be tried, convicted and punished as principal, nevertheless, the indictment against him must specify that he aided and abetted the crime, and must state in what particular manner he aided and abetted it; and that if the indictment charge that he in person perpetrated the crime, it will not be sustained by proof that he only aided and abetted it, or in other words, was an accessory before the fact. Since these decisions were rendered, our attention has been specially called to section two hundred and fifty-five of the Criminal Practice Act, under the belief that it may have escaped our observation; and in order to avoid all misapprehension, in respect to an important point in practice, we deem it proper to say that we find nothing in that section inconsistent with the conclusion already announced. The sole purpose of that section was to abolish all distinction, in cases of felony, between an accessory before the fact and the principal, in respect to the grade of the offense, and to its punishment. The accessory is to be indicted, tried and punished as the principal; nevertheless, the particular acts which establish that he aided and abetted the crime, and thus became in law the principal, must be stated in the

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indictment. When these facts are averred and proved, the law considers the accused to be the principal, and condemns him accordingly. But section two hundred and thirty-seven of the Criminal Practice Act provides that the indictment shall contain "a statement of the acts constituting the offense"; and this important requirement would be wholly ignored if an indictment which alleges that the defendant in person committed the crime would be supported by proof that he only aided and abetted it. It is a fundamental principle in criminal jurisprudence, that the accused is entitled to be informed by the indictment of the particular acts which he is alleged to have committed, as constituting the offense; and if he, in fact, only aided and abetted the crime, the fact must be so stated in the indictment. He then comes to the trial with a knowledge of the acts which are imputed to him. But, on the opposite theory, the indictment would charge him with one act, or series of acts; and he might be convicted on proof of a wholly different act, or series of acts. We can attribute no such unreasonable result to our Legislature on the subject. We think the true rule on this subject is laid down in *People v. Swartz*, 32 Cal. 160; *People v. Campbell*, Oct. Term, 1870.

It is claimed by counsel for respondent, that prior cases in California—the law when the statutes of the State of Nevada were adopted—are in conflict with the case just cited; but they are not clearly so on the precise point at issue; but the argument of counsel upon principle and reason is conclusive.

Counsel says, and so is the law, that at common law, in the highest and in the lowest crimes, high treason and misdemeanor, there are no accessories; that an indictment charging a defendant as principal actor in treason or misdemeanor is supported by proofs that defendant counselled or advised, or aided or abetted in the commission of the crime.

Says Mr. Bishop: "The doctrine of the books, let us remember, is that in treason there are no accessories; but that they who in felony would be such, are in treason principal offenders. Let us see what this doctrine implies, as concerns accessories before the fact. It implies the right of the prosecuting power to treat them as having done the act. The indictment against them may mention

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the thing as performed through the agency of another ; or it may omit the matter of agency, and leave the prosecutor producing the proofs to rely on the legal rule that what one does by an agent is to be regarded as done by himself ; either form of allegation according with the established practice in all other pleadings civil and criminal. That such is the only true meaning which this doctrine can have is plain ; because the distinction between the accessory before the fact and his principal, in felony, is merely in the form of the allegation, and in the order of the trial ; while, as we have seen, the accessory would be a principal but for a technical rule of the old common law, introduced therein by a blunder, against sound reason, and against the general teachings of the common law itself in both civil and criminal jurisprudence. (1 Bishop Crim. Law. Sec. 624. See also Secs. 616 and 627.)

It must be confessed, that no greater particularity in setting forth the acts or facts constituting a crime, is required by the statutes of the States of California or Nevada, than at common law. If, then, it would have been sufficient at common law, to have charged an accessory to a felony as principal, but for the technical rule which has been abrogated by those statutes, it necessarily follows, that under such statutes such pleading is good. The reasoning of the California case quoted, if carried to its logical conclusion, would result in a recapitulation of the evidence relied on for a conviction in the indictment. Take for instance this case, leaving appellant for the moment at one side. Several parties were present at the commission of a robbery ; one did one act, one another, and so on. Does the law require a recital of the separate acts of each person ? Certainly not ; that is a matter of proof.

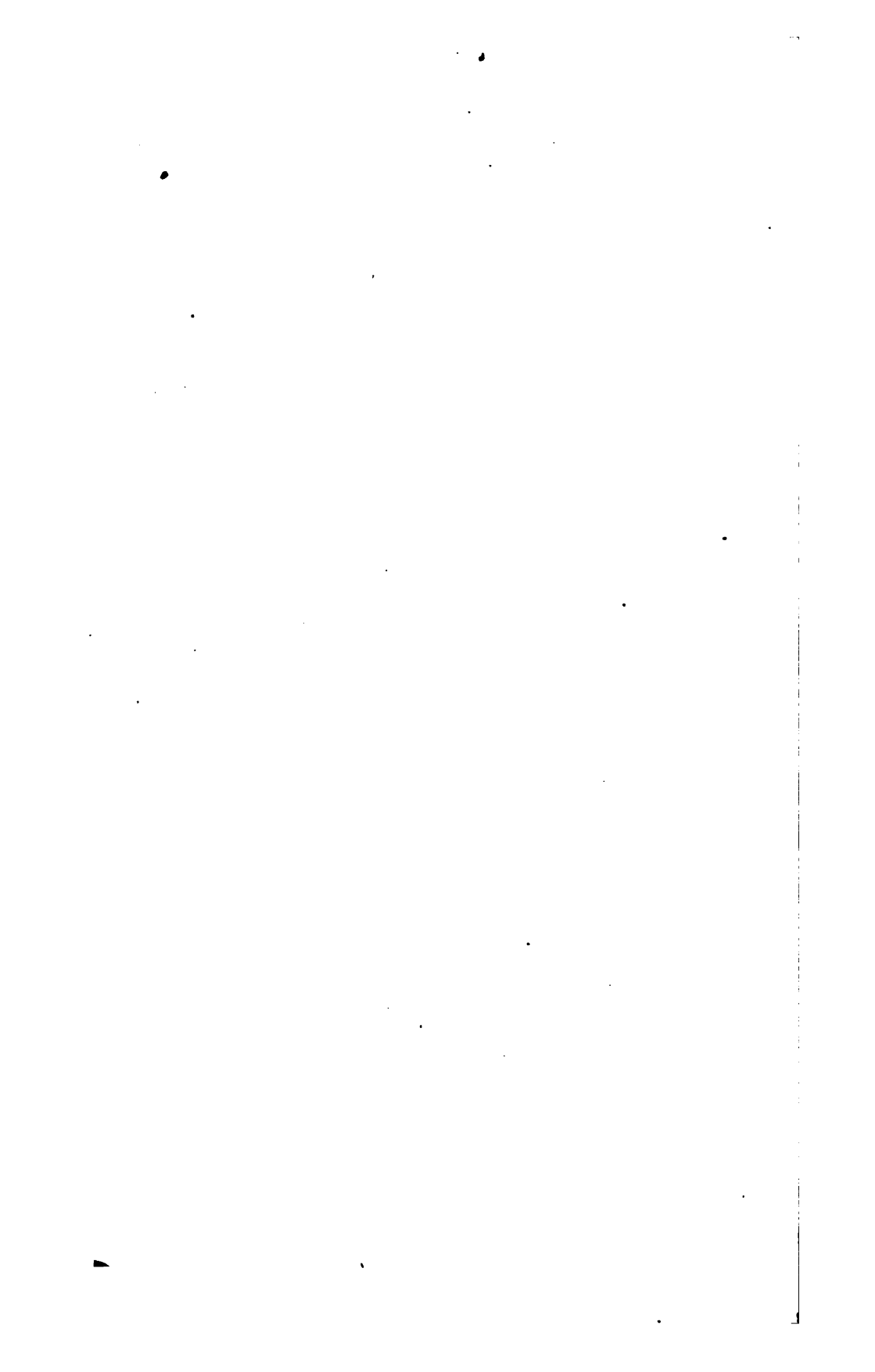
The offense is robbery. The general act constituting such offense necessary to be charged, is the "felonious and violent taking of money, goods, or other valuable thing, from the person of another by force or intimidation." (Stats. 1861, 66, Sec. 60.) The particulars required to be stated are, the time, place, property, and person from whom the same is taken. Not the special act which any one accused may have done in active or passive aid of the ultimate acts ; but the *ultimatum*. If in this case Squiers uncoupled the cars ; Davis held a gun ; Cockerell gagged the messenger, and others did

other acts; yet it is not necessary to state these doings; that would not be claimed by any criminal lawyer; because the mere aiding presence constitutes, in the eye of the law, a commission of any and everything which, when combined, produce the consummation.

So the statute referred to, wiping out the technical distinction of the common law in felonies, says, that one aiding, abetting, assisting, advising, or encouraging, though not present, shall be deemed and considered as principal, and present and punished accordingly; precisely as at common law such an one was treated in case of high treason or misdemeanor; that, as there, no distinction shall "hereafter" from the date of the statutes in the States named, exist, between an accessory before the fact and a principal; and that all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid or abet in its commission, though not present, shall be indicted, tried and punished, as principals.

It would be difficult to conceive of language more clearly abolishing the distinction of the common law; and so say the Supreme Court of California. This premise admitted, it would seem that the only logical conclusion must be, that as to the principal actors at a felony, of whom the accessory before the fact is one, only ultimate acts need be stated; and that with regard to these, it is generally sufficient to charge the acts or facts of the crime in the language of the statute, supplying in every case the particulars as before suggested. In any event, no rule of pleading either requires or permits the recital of personal or individual acts, as distinguished or subdivided from the totality constituting the crime sought to be charged; such acts are to be proved as the basis, whence results the legal conclusion of guilt. So, when a robbery is charged under the statute in question, proof that one held a gun; that one took the property; that one, not present, had theretofore in any manner aided, advised, or encouraged the final act, would necessarily, against all as well as either, support the legal conclusion of a crime committed. These remarks dispose of all that is substantial in the points presented and urged upon this appeal, which is, as has been endeavoured to be shown, not well taken.

The various orders of the District Court and its judgment are affirmed.



REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT

NOTE.—The following cases were submitted at the January term, and should have been designated as January cases ; but through inadvertence they were given as belonging to the April term, 1871, and the error not discovered until the edition was printed.—REPORTER.

F. W. CLUTE, ~~APPEALANT~~,

SPONDENTS.

SALE—DELIVERY AND CHANGE OF POSSESSION. Where Hanchett sold a team to Clute, who took and retained possession for one day and then allowed Hanchett to take it back and keep and use it six weeks, Clute meanwhile paying the expenses and receiving the earnings ; and then Clute resumed possession and put it on a ranch ; and the next day suits were commenced against Hanchett and the team attached as his property: *Held*, that the sale and delivery was valid as against the attaching creditors.

DELIVERY AFTER SALE AND BEFORE ATTACHMENT. Where goods were sold and the vendee took possession at a time subsequent to the sale but before the levy of an attachment: *Held*, that the delivery before the attachment satisfied the statute of frauds and validated the sale.

STATUTE OF FRAUDS—STATUS OF CREDITOR TO ATTACK SALE OF GOODS FOR WANT OF DELIVERY. A mere creditor at large is not in a position to attack a sale of goods by his debtor on the ground of want of delivery and change of possession under the statute of frauds : before he can do so he must acquire a lien by attachment or otherwise.

APPEAL from the District Court of the Eighth Judicial District, White Pine County.

Clute v. Steele.

This was an action of replevin to recover the possession of a wagon, five mules and six sets of harness, said to be worth one thousand, two hundred dollars. The defendants were the constable and attaching creditors referred to in the opinion. The case was tried by jury, and a verdict rendered for the plaintiff. A motion for a new trial having been made by defendants, the Court below granted it; and plaintiff appealed from the order.

J. S. Pitzer and A. M. Hillhouse, for Appellant.

I. The District Judge held that, as Hanchett continued *apparently* in possession of the property for several weeks after the sale, there was no immediate change of possession within the meaning of the statute of frauds. We contend that if the sale was made and possession completed prior to the levy of the process by the attaching creditors of Hanchett, it was good.

It is true that it was at one time held in California, where the wording of the statute is the same as in this State, that the word "continued," as used in the statute, meant forever, and the word "immediate" meant forthwith, whether rights of others intervened or not. (*Chenery v. Palmer*, 6 Cal. 119.) But after several years the Court of that State reversed the very illogical and unreasonable decisions on the word "continued," and now hold that the proper construction is that such a continued change of possession shall be made as to show to the world a change of property, (15 Cal. 503) and this Court in *Carpenter v. Clark*, 2 Nev. 244, hold the same doctrine. Under these decisions, the proper construction of the word "immediate" is prior to the time the rights of creditors or purchasers accrue.

II. No one is a creditor within the meaning of the statute of frauds till a lien is acquired. (19 Cal. 109; *Thornburgh v. Hand*, 7 Cal. 554.) There were no creditors till attachment or execution was levied, or at least procured. Clute had acquired exclusive and continued possession before any one had a right to question the sale. (1 Pick. 288; 4 Leigh, 535; 5 U. S. Digest, 730; 7 U. S. Digest, 430; 26 U. S. Digest, 257; 18 Iowa, 312; 2 Kent, 515.)

Clute v. Steele.

Kittrell & Hunt and *A. C. Ellis*, for Respondents.

I. Whether the transaction between Hanchett and Clute, on the twenty-sixth day of April, 1870, amounted to a sale or a mortgage, so far as respondents in this case are concerned, it matters not. (*Woods v. Bugbee*, 29 Cal. 466.)

II. The sale, or mortgage, whichever it is, was void as against the admitted judgment creditors of Hanchett, and the evidence did not sustain the jury in finding otherwise. (*Hurlburt v. Bogardus*, 10 Cal. 518; *Stevens v. Irwin*, 15 Cal. 503; *Goodshaw v. Mulford*, 26 Cal. 316; *Woods v. Bugbee*, 29 Cal. 466; *Doak v. Brubaker*, 1 Nev. 218; *Sharon v. Shaw*, 2 Nev. 289; *Lawrence v. Burnham*, 4 Nev. 361.)

III. The point contended for by appellant, under a statute of which our own is a copy, was directly decided against him in the case of *Chenery v. Palmer*, 6 Cal. 119.

By the Court, WHITMAN, J.:

This appeal is from an order granting a new trial. There is no dispute about the facts, which are thus stated by the district judge: "The facts of this case are, that Hanchett was indebted to Clute for advances made by him for Hanchett. To pay said indebtedness, he sold to Clute the property in controversy in this action, on the twenty-sixth day of April, 1870. Clute took possession of the property, and retained it one day, and then permitted Hanchett to take it back, and keep it in his possession, using it as his own, until June seventh or eighth following; Clute paying the expenses and receiving the earnings of the team. Clute then took it into his possession, and put it on a ranch. On the ninth, suits were commenced by Korn, McLeod and others, against Hanchett, for debts then actually due to them from Hanchett, and attachments regular in all respects were issued in said cases against the property of Hanchett, and placed in the hands of the defendant Steele, as constable, to be served. Steele, on the same day, made service of said attachments by levying on the mules, wagons and harness in controversy, which had been delivered to Clute on the seventh or eighth of June, but sold to him on the twenty-sixth of April.

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Clute demanded the return of them as his property, and said demand being refused, commenced this action. The jury found a verdict for plaintiff, upon which defendants moved for a new trial."

Upon these facts, it is claimed that the sale was void under the statute of this State. Touching this question, the statute reads: "Every sale made by a vendor of goods and chattels in his possession, or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of things sold or assigned, shall be conclusive evidence of fraud, as against the creditors of the vendor, or the creditors of the person making the assignment, or subsequent purchasers in good faith."

"The term 'creditors,' as used in the last section, shall be construed to include all persons who shall be creditors of the vendor, or assignor, at any time while such goods and chattels shall remain in his possession or under his control." (Statutes 1861, 20, Secs. 64, 45.)

The only presumption to be deduced from the statement of the Judge, though the expression is, perhaps, not entirely clear, is, that the respondents claiming as attaching creditors, were creditors at large of Hanchett prior to the seventh day of June, 1870, and while the property remained in his possession, after the sale of the twenty-sixth of April; but having no lien by judgment or otherwise, until after the delivery of the property: and the holding of the District Court was substantially, that being such creditors they had the right, so soon as they altered their position from that of creditors at large to that of creditors having a lien, to contest the validity of the sale; and that as to them, the failure of the appellant to take and hold the property in suit by virtue of an immediate delivery to him from his vendor, and an actual and continued holding on his part thereafter, rendered the sale conclusively fraudulent.

What is the immediate delivery and actual and continued holding required by the statute, has been stated by this Court heretofore. (*Carpenter v. Clark*, 2 Nev. 243.) Where there is no dispute upon the facts, as in this case, there remains only a question of law for the Court, and hence the only point here is as to the law as held by the District Court.

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Up to a certain point this was correct. Such a sale as the one under discussion was by the principles of the common law, as also the Statute of 13 Eliz., and is under the decisions of the Courts of this Union, Federal and State, void against creditors and subsequent purchasers in good faith; but only as against them. Differences have arisen in judicial decisions, as to the weight to be given to the fact of non-delivery; and it has been held, on the one hand, to be conclusive evidence of fraud, and on the other, to be susceptible of explanation. With that question this Court has nothing to do. The statute of this State is imperative on that point.

While, however, decisions have been thus various, there has been a uniformity of holding upon the necessary status of those who might question such a sale, and the conclusion is, that no creditor at large may do so; and that a delivery before the attachment of any lien of a creditor will satisfy the law and validate the sale.

Mr. Hilliard says: "And the general rule may be laid down, that where a vendee takes possession at a time subsequent to the sale, but before the rights of creditors accrue by attachment or otherwise, he shall hold against creditors." (Hilliard on Sales, 183, n.: citing *Bartlett v. Williams*, 1 Pick. 288; see also *Kendall v. Samson*, 12 Vt. 515; *Coty v. Barnes*, 20 Vt. 19; *Wilson v. Leslie*, 20 Ohio, 161; *Brown v. Webb*, 20 Ohio, 389; *Nelson v. Wheelock*, 46 Ill. 25; *Frank v. Miner*, 50 Ill. 445; *Smith v. Stern*, 17 Penn. State, 360; *Levin v. Russell*, 42 N. Y. [3 Hand] 251; *Hoofsmith v. Cope*, 6 Wharton, 53; *Murray v. Riggs*, 15 Johns. 571; *Snydor v. Gee*, 4 Leigh, 535; *Carr's Admins. v. Glasscock*, 3 Gratt. 354.)

Whatever the reason for this rule, it is uniform; and in California and Pennsylvania, where once an opposite opinion was held, such has been substantially, if not in express language, reconsidered and overruled. Within this rule the respondents herein come, under the facts as found by the district court, and they are not in a position to contest the sale under the statute. Hence, it was error to pronounce such sale fraudulent as to them; and the motion for a new trial was improperly allowed.

The order is overruled and the cause remanded.

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THE STATE OF NEVADA, RESPONDENT, v. HENRY VAN
WINKLE, APPELLANT.

CHARGING CIRCUMSTANTIAL TO BE SUPERIOR TO DIRECT EVIDENCE, ERROR.

Where the court in a criminal case instructed the jury that "circumstantial evidence is more satisfactory than the testimony of a single individual, who swears he has seen a fact committed": *Held*, error.

SHOWING OF IMMATERIALITY OF ERROR IN CRIMINAL CASES MUST BE CONCLUSIVE. On an appeal, where error is shown to have been committed, the burden of establishing its immateriality is on the respondent; and in criminal cases the showing of immateriality must be conclusive.

JURISDICTION OF SUPREME COURT TO REVIEW EVIDENCE IN CRIMINAL CASES?

Is it within the jurisdiction of the Supreme Court (Const., Art. VI, Sec. 4) to review the evidence in a criminal case, and decide that it does not sustain the verdict?

APPEAL from the District Court of the Sixth Judicial District, Lander County.

Defendant was indicted for the crime of an attempt to commit arson in attempting to fire and burn a building in Austin, Lander County, known as the "Masonic and Odd Fellows' Hall Building," and a stock of goods therein belonging to himself, worth four thousand dollars, but insured in various insurance companies in the aggregate sum of thirteen thousand dollars. The offense was alleged to have been committed in August, 1870, and the indictment set out that defendant placed pieces of blankets saturated with coal oil on the second floor of the building, and kindled them with intent to burn the building and stock, and defraud the insurers; and that he was intercepted and prevented in the execution of the crime of arson so attempted to be committed. Being convicted, he was sentenced to imprisonment in the State prison for the term of three years.

N. D. Anderson, for Appellant.

L. A. Buckner, Attorney General, for Respondent.

By the Court, GARBER J. :

The appellant was convicted of an attempt to commit arson. A motion for a new trial was overruled. The testimony was circum-

stantial. The Court below, at the request of the prosecution, gave to the jury the following instruction: "If the testimony establishes the guilt of the defendant beyond a reasonable doubt, it is your duty to find him guilty, although the testimony is but circumstantial. The term 'reasonable doubt,' does not mean a mere possible doubt, because everything relating to human affairs and depending on moral evidence, is open to some possible or imaginary doubt. A reasonable doubt is that state of the case which, after comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge. The jury must be satisfied from the evidence of the guilt of the defendant beyond a reasonable doubt, before they can find him guilty; but in order to justify the jury in finding the defendant guilty, it is not necessary that the jury should be satisfied from the evidence of his guilt beyond the possibility of a doubt. Although the jury may think that it is possible that the defendant did not commit the crime, yet if the jury is satisfied from the evidence of the guilt of the defendant beyond a reasonable doubt, they are bound to find him guilty, whether that guilt is so proved by direct or circumstantial evidence. If jurors were to disregard circumstantial evidence, there would be an end to the administration of law and of government. Although there have been rare cases where innocent persons have been found guilty upon circumstantial testimony, yet it must be remembered that notwithstanding all that can be urged against it, this kind of testimony is, in the judgment of those most experienced in the investigation of truth and the administration of justice, not unfrequently as satisfactory, if not more so, than the positive testimony of individuals; and the jury should not attach too much importance to the teachings of such cases. The eye of omniscience can alone see the truth in all cases; circumstantial evidence is there out of the question; but clothed as we are with the infirmities of human nature, how are we to get at the truth without the concatenation of circumstances? Though in human judicature, imperfect as it must necessarily be, it sometimes happens that in a few instances, owing to the minute and curious circumstances which sometimes envelope human transactions, error has been committed, *yet this species of*

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evidence is more satisfactory than the testimony of a single individual who swears he has seen a fact committed."

The concluding portion of the instruction lays it down as a rule of law, that circumstantial evidence is more satisfactory than direct, where the latter consists of the testimony of a single eye-witness: that is, that circumstantial testimony is more satisfactory than another given species of testimony which may be sufficient to warrant a conviction. (*Comm. v. Tuttle*, 12 Cush. [Mass.] 504.)

It is contended that the instruction refers to circumstantial evidence in general and as a species, and not to the absolute or comparative weight of the evidence in this particular case; and this seems to be the construction most favorable to the correctness of the instruction. To have instructed the jury that the evidence before them was more satisfactory than would be that of a single eye-witness, would have been manifestly erroneous—a clear invasion by the Court of the province of the jury, who are the sole and exclusive judges of the "sufficiency in fact" of the evidence. It would have been deciding a question of fact, not laying down a rule of law.

If the instruction is that circumstantial evidence is universally and always more satisfactory than direct evidence, or than a specified mode of direct evidence, is it not equally erroneous? Is there, or can there be such a rule of law? Suppose one biased witness swears to each of a series of facts, from which, if believed, an inference of all the facts constituting guilt can fairly be drawn. Would such circumstantial evidence be deemed more satisfactory than if one fair witness had sworn directly to the facts inferred? Circumstantial evidence may or may not be more satisfactory than the testimony of an eye-witness. Whether it is or is not, depends upon the circumstances of each particular case. The integrity, capacity and means of knowledge of the witness who testifies directly on the one hand; and the integrity, capacity and means of knowledge of the witness or witnesses who testify to facts from which other facts are to be inferred, together with the correctness of the inferences drawn, on the other hand. Thus depending, the question is one of fact, not of law. The law cannot declare in general which is the more satisfactory, by any defined combinations

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of facts, so much does the question depend upon the minute and peculiar circumstances incident to each case. (Starkie Ev. 411.) The same great writer further says: "In the abstract, and in the absence of all conflict and opposition between them, the two modes of evidence do not in strictness admit of comparison. In theory, circumstantial evidence is stronger than positive and direct evidence, wherever the aggregate of doubt arising first upon the question, whether the facts upon which the inference is founded are sufficiently established; and secondly upon the question whether, assuming the facts to be fully established, the conclusion is correctly drawn from them, is less than the doubt: whether in the case of direct and positive evidence, the witnesses are entirely faithful." (Ib. 525-6.)

We find the same doctrine in other standard works. "There is no necessity for raising or rating circumstantial evidence, in general, higher than direct. In many individual instances it *may be* superior in proving force to other individual cases of proof by direct evidence. A chain of circumstances, each proved by eye- or ear-witnesses, each capable of being contradicted or disproved, all submitted to the plain sense of a jury of intelligent men, is *often* more to be relied upon than the direct and positive assertions of a witness who may not be intelligent or who may be dishonest. But a judgment based upon circumstantial evidence cannot, in any case, be *more satisfactory* than where the same result is produced by direct evidence free from suspicion of bias or mistake. * * *

In truth, these two kinds of evidence ought not, in a general view of their merits, to be contrasted or set in opposition. * * As to the argument founded upon the abundance of circumstances, opportunities of contradiction they afford, &c., while each of these adds greatly to the probative force of circumstantial evidence in particular cases, they have clearly no connection with the value of circumstantial evidence in the abstract." (Burrill Circ. Ev. 229-236; Wills C. Ev. 29-48.)

The instruction cannot be sustained, as comparing circumstantial evidence in the abstract, either with direct evidence or the direct evidence of one witness. Chief Justice Gibson says that circumstantial evidence is, in the abstract, nearly though perhaps not quite

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as strong as positive evidence: Wills, that "The best writers, ancient and modern, on the subject of evidence, have concurred in treating circumstantial as inferior in cogency and effect to direct evidence — a conclusion which seems to follow necessarily from the very nature of the different kinds of evidence": and Phillips, that "Circumstantial evidence has, *in some instances*, undoubtedly been found to produce a much stronger assurance of the prisoner's guilt, than could have been produced by the most direct and positive testimony. As a general principle, however, it is certainly true, that positive evidence of a fact, from credible eye-witnesses, is the most satisfactory that can be produced, and the universal feeling of mankind leans to this *species* of evidence, in preference to that which is merely circumstantial."

On the other hand, Mr. Justice Park, if he is correctly reported, in charging a jury used the language of the concluding portion of this instruction, with the exception that he said "much more satisfactory," instead of "more satisfactory." We have seen no authorized report of the case (*Rex v. Thartell*) in which this charge is said to have been delivered; but an extract from it is copied into the text books, and has received the sanction of a *dictum* of the Supreme Court of California.

This extract evidently comprises but a small portion of the charge, and the omitted portion may have so guarded and qualified the expression as to bring it in harmony with the other authorities. Very likely, the expression actually used was, "often much more satisfactory," as we find it generally so used by the English judges in their charges and opinions. Wharton cites Wills as authority for the extract. The case is cited by both Wills and Burrill, but in another connection; and although they devote a considerable portion of their works to a vigorous attack upon the opinion said to be expressed in this extract, and severely criticise other cases containing similar expressions, they nowhere intimate that Justice Park ever made such a ruling. In any event, and if either of the two species of evidence can be said to be in the abstract weaker than the other, the weight of opinion and the better reason is, that direct evidence is the more satisfactory.

As the number of witnesses, circumstances, etc., has no connec-

tion with the *abstract* value of the two species of evidence, it is as erroneous to rate circumstantial evidence in the abstract higher than the direct testimony of one individual, as to rate it higher than the direct testimony of individuals. If it be contended that this instruction—or the opinion in *People v. Cronin*, 34 Cal., from which it was in part taken—merely affirms two propositions: first, that circumstantial evidence in the abstract is less satisfactory than direct testimony in the abstract; and second, that circumstantial evidence, as it usually occurs, is more satisfactory than direct testimony consisting of one witness, there are two answers. The instruction is not so guarded; and if it were, the remark of Chief Justice Shaw in the Webster case, that it is not easy so to compare their relative value, applies. All that can be affirmed is, as he there said, “that each has its advantages and disadvantages. The advantage in favor of direct is, that you have the direct testimony of a witness to the fact to be proved, who, if he speaks the truth, saw it done; and the only question is whether he is entitled to belief. The disadvantage is, that the witness may be false and corrupt, and the case may not afford the means of detecting his falsehood.” On the other hand, “the advantages are that as the evidence commonly comes from several witnesses and different sources, a chain of circumstances is less likely to be falsely prepared and arranged, and falsehood and perjury are more likely to be detected and fail of their purpose. The disadvantages are, that the jury has not only to weigh the evidence of facts, but to draw just conclusions from them.” The result is that given from Starkie—not that the circumstantial evidence is more satisfactory, but that it is so when the aggregate of doubt mentioned by him is less than the doubt whether the direct witness be faithworthy. Further than this the law cannot go. It cannot even affirm that a jury is less likely to draw false inferences from proven facts than a single witness is to forswear himself, or mistake the evidence of his senses, in a prosecution for a public offense. If the instruction imputed to Justice Park is correct, is not also the converse? Then, whenever a party is sought to be convicted on the direct testimony of one witness, must an acquittal be practically insured by instructing that such testimony is “much less satisfactory” than would be

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circumstantial evidence of his guilt? We think that, standing alone, this concluding portion of the instruction is erroneous; nor do we see that the error is cured by what preceded. Throughout, circumstantial evidence is mentioned without reference to its strength or weakness as affected by the number of witnesses testifying, the number or concurrence of circumstances testified to, or their nature as conclusive or inconclusive. Error being shown, the burden of establishing its immateriality is on the State, and in criminal cases, the showing of immateriality must be conclusive. We cannot say that the instruction taken as whole might not have conveyed to the mind of a man of ordinary capacity an incorrect view of the law applicable to the cause. Such a juror, with this instruction in his hands, may have reasoned: "It is true, I must not find the defendant guilty, unless the testimony has convinced me of his guilt beyond a reasonable doubt; but this is a case of circumstantial evidence, and I am instructed that such testimony is more satisfactory than that of a single eye-witness would be. Now, if one of my neighbors—a man whom I have known and trusted for years—had sworn that he saw the defendant set fire to these cans, I should entertain no doubt of his guilt." The very distinction made between the testimony of individuals and that of a single individual, increases this tendency to mislead, by inducing the construction that such testimony is *often* as satisfactory as the direct testimony of individuals, but it is *always* more satisfactory than that of one individual.

In *Cicely v. State*, 13 S. & M. 211, a case of circumstantial evidence, the Court below refused to instruct that, unless the jury were as well satisfied from the evidence of the guilt of the accused as they would be from the testimony of a single witness testifying directly to the fact, they should acquit. The Court of Errors, sustaining the ruling, say: "It is said (1 Starkie's Ev.) that the legal test of the sufficiency of evidence to authorize a conviction is its sufficiency to satisfy the understanding and conscience of the jury: that a juror ought not to convict, unless the evidence excludes from his mind all reasonable doubt of the guilt of the accused." This is doubtless the only true and practical criterion, by which the force of evidence in criminal prosecutions, sufficient for

conviction, is to be determined. The objection to this instruction is, that it applies a rule which is neither practical nor altogether safe.

Under the operation of this rule, the juror would be compelled to act not upon the direct effect which the evidence had produced upon his mind. He would be not only required to inquire into the state of his mental convictions; to ascertain whether the evidence, offered in support of the prosecution, had excluded from his mind all reasonable doubt; he would be forced to go farther, and to institute a comparison between the degree of conviction produced by the evidence and that which would be the result of the testimony of one direct witness; for that would be the standard by which he would have to determine the degree of certainty in the proof, which would authorize a conviction or require an acquittal. We have daily experience that the same evidence does not invariably produce the same degree of conviction in different minds. Hence, we may well conclude that the legitimate force of the direct evidence of a single witness would be differently estimated by persons whose minds were differently constituted. The practical application of the principle contained in the instruction would, in effect, be to adopt a standard for estimating the force of this species of evidence, which would differ with the varying mental organization of each juror. Its practical effect, in all probability, would be, on the one hand, to lead to convictions in cases where, by the use of more intelligible and safe rule, acquittals would follow; and on the other, to produce acquittals where, by the same test, the parties would merit conviction. In the case cited, the jury had, as here, been already fully instructed on the question of reasonable doubt, and the charge refused was, and was admitted to be, as a legal proposition, an "abstract verity." The instruction given in this case is, as an abstract proposition, erroneous, but of a similar tendency to lead to improper convictions—to embarrass rather than assist the jury. Whether the testimony was sufficient in fact to authorize a conviction, is a question upon which we express no opinion. It is the right of the defendant to have that question decided by the verdict of a jury applying, and applying only, the proper legal tests. Nor do we intimate, that in cases of this kind there is any impropriety in

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guarding the jury against the opposite errors of rating circumstantial evidence too low, and paying too much attention to arguments setting forth the danger of convicting innocent persons on such testimony or giving instances of such convictions. To this end, it is proper that the jury be admonished in fitting terms, that it is essentially necessary to the security of mankind that juries should convict, when they can do so safely and conscientiously, upon circumstantial testimony; and that otherwise, the very secrecy with which crimes are often committed would secure safety to the criminal; that in such cases the law allows the introduction of circumstantial evidence, and by it there may be, and often is afforded, a safe and satisfactory ground of assurance and belief; that the fact, that innocent men have sometimes been convicted on insufficient circumstantial evidence, does not prove that guilty men should not be convicted on sufficient circumstantial evidence; any more than the fact, that innocent men have been convicted on the direct testimony of perjured or mistaken witnesses, proves that guilty men should not be convicted on adequate direct testimony free from suspicion of bias or mistake; that the force and efficiency of either species of evidence may, according to circumstances, be carried to an indefinite and unlimited extent; that circumstantial evidence, as well as direct, may be so cogent as to exclude from the mind all reasonable doubt of the guilt of the accused, and that if the jury is convinced by the evidence of such guilt, beyond such doubt, it is equally their duty to convict, whether the result is produced by direct or by circumstantial evidence. The advantages and disadvantages of each mode may be pointed out, and the jury instructed that the just conclusion to be drawn from cases where innocent persons have been convicted upon circumstantial testimony, is not that we are to abandon all confidence in this kind of evidence, but that such cases may be addressed as an admonition to the jury to use great care and caution in weighing the evidence, and to draw no inferences from the proved facts but such as are reasonably and morally certain.

We are asked to review the evidence, and to decide that it does not sustain the verdict. But on the threshold of this inquiry we are met by the question whether this is within our jurisdiction.

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This question has not been argued, and we do not propose to decide it in this case. We call attention to it because of its importance, and that when it next arises it may be fully argued. To hold that this is a question of fact may amount to a denial of our jurisdiction in all cases where the granting or refusing a new trial depends upon conflicting or contradictory affidavits, as in case of alleged misconduct of jurors: such cases, for instance, as *People v. Plummer*, 9 Cal.

By the Constitution, our jurisdiction in criminal cases is limited to questions of law alone. The statute in force before, at the time of, and since the adoption of the Constitution—every lineament of which shows its common law parentage—confines our jurisdiction within the same limits. We must then look to the common law to ascertain what are questions of law and what questions of fact. By the common law the Judges answered the former, the jury the latter. The fact must, it is said, in the nature of things, be first ascertained—"without a fact agreed it is as impossible for a Judge, or any other, to know the law relating to that fact, or direct concerning it, as to know an accident that hath no subject." When the fact is disputed, the jury must find it. Ordinarily, in so doing, they compound their verdict of the law as given to them by the Judge, and the fact as ascertained by themselves. But there are methods by which the party may, if he choose, withdraw from the jury the application of the law to the fact. This may be done by a demurrer to evidence; or he may ask an instruction that there is no evidence before them of a certain essential fact, or no evidence to sustain the issue on behalf of the other party, and tender an exception if the instruction be refused. By either method a question of law is raised, but all the facts which the evidence tends to prove are admitted. Then, by parity of reasoning, are we not to look at the evidence on this motion just as we would on a demurrer to evidence, or a bill of exceptions to a refusal to instruct as to the insufficiency of the whole evidence? If so, is every fact and conclusion which the evidence in the slightest degree tends to prove admitted, or only such as it fairly and reasonably tends to prove? It is said there is a "sufficiency in law" as well as a "sufficiency in fact" of evidence. Its suffi-

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ciency in fact being exclusively for the jury to decide, subject only to revision, as a "question of fact," on motion for a new trial; not on a writ of error, as a "question of law"; not the subject of a bill of exceptions, which raises only questions of law decided during the trial. But that the legal sufficiency of the evidence adduced to sustain the issue or to establish any essential fact, is a question of law and not of fact; and wherever it is so light and inconclusive that no rational, well constructed mind can infer from it the fact which it is offered to establish, it is the duty of the Court, according to circumstances, either to reject it as inadmissible or to instruct the jury that there is no evidence before them to warrant their finding the fact thus attempted to be proved. According to this view, we have jurisdiction—all the evidence being embodied in the bill of exceptions or affidavits—assuming all facts of which there is legal evidence and drawing all conclusions which can be fairly and logically drawn in support of the verdict or decision—to decide, as a question of law, whether the evidence is sufficient to sustain such verdict or decision in a criminal case.

It is frequently said that the granting or refusing a new trial, on the ground that the verdict is against the weight of, or contrary to, the evidence, is a matter of discretion; and that therefore such rulings cannot be reversed on a writ of error, or spread on the record by a bill of exceptions. Perhaps this is only another way of saying that it is the decision of a question of fact—the determination of a question of law hardly admitting of the exercise of discretion.

If our jurisdiction is more limited in criminal than in civil cases, does not this impose on District Judges the obligation of a greater care and caution in thus finally deciding on questions involving life and liberty; of attending more strictly to the distinction between an appellate Court, which only sees the evidence as embodied in a transcript, and a *nisi prius* Judge who, equally with the jury, closely watches the testimony as it is given in, observes the bearing and demeanor of witnesses, and in short, possesses the same facilities for arriving at a correct ascertainment of the facts as the jury? While the former tribunal can only—even in a civil case—grant a new trial where the record can show that the verdict is palpably against the weight of evidence, the latter should, wherever there are strong

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probable grounds to suppose that the merits have not been fairly and freely discussed, and that the decision is not agreeable to the justice and truth of the case, though they should not, where the scales of evidence hang nearly equal: that which leans against the verdict ought always strongly to preponderate. That is, in a civil case, the *nisi prius* Judge should not grant a new trial, where it is doubtful whether the verdict is right or wrong, where his mind wavers and oscillates; but should, where he has a clear and unhesitating conviction that the verdict ought to have been the other way, and in arriving at this conviction he can consider matters not appearing on the record, such as his observation of the bearing and demeanor and mode of testifying of the witnesses, and other such circumstances as cannot be preserved in the record. It is essential to the beneficial working of jury trials that this power should be fearlessly exercised, even in civil cases; in criminal cases the only distinction would seem to be, that the Judge need only be satisfied that the evidence does not establish guilt beyond a reasonable doubt. It is worthy of consideration too, whether, in deciding all motions in criminal cases, the District Judges should not adopt the practice of stating which witnesses or affidavits they believe, in whole or in part, or separately their findings of fact and conclusions of law, so as to secure to the defendant his constitutional privilege of an appeal on questions of law. Such a practice, in Louisiana, seems to have followed the construction put upon language in their Constitution, exactly the same as that used in ours, their Courts having decided that whether the Judge below credited an affidavit, or whether the defendant used due diligence in procuring the attendance of witnesses, &c., were questions of fact, and could not be reviewed on appeal, any more than the refusing a new trial for verdicts against evidence. The following authorities bear more or less on the points suggested, but not decided in this opinion: *Whiton v. Nichols*, 3 Allen, 586; 8 Cushing, (Mass.) 74; *Comm. v. Merrill*, 14 Gray, 416; *State v. Nelson*, 3 La. Ann. 500; 2 Ib. 887; 16 Ib. 308; 14 Ib. 673; *House v. Elliott*, 6 Ohio State, 499; 7 Ib. 299; *Stephens v. White*, 2 Wash. (Va.) 203; *Bulkeley v. Butler*, 9 E. C. L. Rep. 198; *Vines v. Corporation*, 1 Younge & J. 6; *Coffin v. City*, 26 Iowa, 520; 22 Ib. 241; 15 Ib. 90; *Clarke*

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v. *Dederick*, 31 Md. 150; 7 G & J. Md. 20; *Avery v. Bowden*, 88 E. C. L. R. 972; *People v. Lewis*, 36 Cal. 533; *People v. Jones*, 31 Cal.; *People v. Renfrow*, Ib. Jan. 1871; 10 Ib. 301; Ib. 195; 27 Ib. 500; *Denny v. Williams*, 5 Allen, 1; *Gibson v. Hunter*, 2 H. Blackstone, 205; 23 N. Y. 344; 19 Ib. 212; *Parsons v. Bedford*, 3 Peters, 448; 12 Ib. 345; 2 Ib. 623; 12 Wheaton, 180; 5 Wend. 114; 18 Ib. 84; *People v. Edwards*, 5 Mich. 22; *Jacob v. U. S.*, 1 Brockb. 527; 1 Rawle, 432; *Hansbrough v. Thorn*, 3 Leigh, 147; *Graham v. Camman*, 2 Caine's R. 168; *Winsor v. Queen*, Law Rep. 1 R. B. 289.

We cannot, on this record, say that, as a question of law, the testimony was insufficient to justify a conviction. The judgment and the order refusing a new trial are reversed, and the cause remanded for a new trial.

THE STATE OF NEVADA, RESPONDENT, v. HENRY A. RHOADES, ADMINSTRATOR OF EBEN B. RHOADES, DECEASED, ET ALS., APPELLANTS.

RELEVANCY OF EVIDENCE TENDING TO SUPPORT DEFENSE. On a trial against the sureties on the official bond of a State treasurer, to recover for defalcation claimed to have taken place within the period covered by the instrument, it is competent for defendant to show that the defalcation occurred previous to the giving of the bond, and any testimony tending to support such defense is relevant and pertinent.

EXCLUSION OF RELEVANT TESTIMONY ERROR. Where in an action against the sureties on the official bond of a State treasurer for defalcation, defendants' counsel asked a witness as to the condition of the treasury at a time previous to that covered by the bond; and upon objection, on the ground of irrelevancy, counsel stated that he proposed to show that the defalcation complained of took place before the bond was given, and that to show such fact it was necessary to show the condition of the treasury as asked: *Held*, that the exclusion of the question and proposed testimony was error.

STATEMENT OF COUNSEL TO SHOW RELEVANCY OF TESTIMONY. Where a defendant asked a witness a question which, under the pleadings, appeared directed to proof of irrelevant matter; and upon objection made on that ground, counsel stated the character of his defense; and it appeared that the proposed defense was admissible, and the question one the answer to which might tend to support it: *Held*, that the proposed testimony was relevant, and the exclusion of the question error.

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TEST OF RELEVANCY OF EVIDENCE. To ascertain whether evidence be relevant or not, it is only necessary to determine whether it has a tendency to establish a legitimate case or defense relied on.

INTIMATIONS OF COURT EXCLUDING EVIDENCE. Where a witness was called for the purpose of proving a certain fact; and the court, in ruling out a question in any way calculated to elicit testimony to establish it, informed counsel that proof of such fact would not be admitted: *Held*, that the action of the court was to be treated as a decision ruling out evidence of such fact, and that it was unnecessary for counsel to persist in efforts to prove it.

LIABILITY OF SURETIES ON BOND OF DE FACTO OFFICER. Where a State treasurer, reelected in 1866, accepted a new commission and took a new oath, and continued to discharge the duties of the office, but failed to file a new official bond within the time prescribed by law: *Held*, that he was an officer *de facto* and holding as of the new term; and that the sureties on the new bond afterwards filed were estopped from denying that he was holding as of the new term *de jure*.

SURRENDER OF FIRST TERM BY OFFICER RE-ELECTED. Where an officer on being reelected accepted a commission, and took the oath of office for the new term, and presented a bond therefor, which, however, was not approved, and he failed to present a new one in the time prescribed by law: *Held*, that he had relinquished all claim to continue to hold over under the former term.

OFFICERS DE FACTO. A person discharging the duties of a public office under color of right, is an officer *de facto* and not a mere intruder.

LIABILITY OF SURETIES OF DE FACTO OFFICERS—RECITALS IN OFFICIAL BONDS—ESTOPPEL. Where a person discharges the duties of an office as an officer *de facto* and not as a mere intruder, he and his sureties are estopped by the recitals in his official bond from denying that he is entitled to the office.

OFFICIAL BOND FOR SUM GREATER THAN REQUIRED. Where a State treasurer voluntarily gave an official bond in the sum of \$102,500, while the law only required one in the sum of \$100,000: *Held*, that there was nothing in the law to prohibit the giving and the accepting (if voluntarily offered) of such a bond; and that under the circumstances the excess did not invalidate it.

NO DOCKET FEE IN ACTION BY STATE. The statute requiring the payment of a docket fee on the commencement of every action or proceeding in a district court, (Stats. 1864-5, 406) does not apply to actions commenced by the State.

EVIDENCE—ORAL RESULT OF EXAMINATION OF LONG ACCOUNTS. Where it became material and relevant to know the amount of money which should have been in the State treasury on a certain day: *Held*, that it was competent, under Sec. 427 of the Practice Act, as well as under the law independent of it, for an expert, who had made a full investigation of the accounts of the office, to state orally the result of his examination.

EVIDENCE—BOOKS OF STATE TREASURER PUBLIC RECORDS. In a suit against the sureties on the official bond of a State treasurer charged with defalcation: *Held*, that the entries in the books of the treasurer's office were competent evidence against the sureties without proof that they were made by or with the knowledge of the treasurer personally; such books being official (Stats. 1866, 57) and coming under the head of public records.

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APPEAL from the District Court of the Second Judicial District, Ormsby County.

This action was instituted in March, 1870, by the then Attorney General, and judgment rendered, in pursuance of the prayer of the complaint against the defendants, in November, 1870. These defendants consisted (in addition to the administrator of Eben Rhoades, deceased, the defaulting State Treasurer,) of the sureties on his official bond; and judgment was rendered against the administrator and such sureties, in sums as follows: John Gillig and A. K. Grim, \$9,756.09; William Sharon and George F. Jones, \$9,756.09; D. E. Avery and Joseph D. Winters, \$9,756.09; George P. Howe and S. Steiner, administrator of Augustus Koneman, \$9,756.09; James W. Haines and E. Mallory, \$9,756.09; E. B. Rail and P. H. Clayton, \$9,750.09; J. F. Goodman and O. S. Carville, \$4,878.04; J. L. Black and A. S. Olin, \$4,878.04; John Piper and C. Carpenter, \$4,878.04; R. W. Perkins and C. N. Noteware, \$4,878.04; Harriet Smith, administratrix of T. G. Smith, and H. M. Yerrington, \$4,878.04; Horatio S. Mason and A. B. Driesbach, \$4,878.04; Aaron D. Treadway and George L. Gibson, \$4,878.04; John G. Fox, \$4,078.04, and George T. Terry and David L. Hastings, \$2,439.02.

R. S. Mesick and Sunderland & Wood, for Appellants.

I. The District Court had no jurisdiction to try the case against the objection of defendants that no docket fee had been paid. (Const. Art. VI, Sec. 16; Stats. 1864-5, 406, Secs. 1, 2; *Brown v. Davis*, 1 Nev. 409; *Imperial Co. v. Barstow*, 5 Nev. 252.)

II. The commission of E. Rhoades as treasurer and the bond should have been excluded. (Const. Art. XVII, Sec. 18; Art. V, Sec. 19; *Lytle v. Davies*, 2 Ohio, 277; *Olds v. State*, 6 Blackford, 91; *Com. v. Jackson*, 1 Leigh, 485; *Stewart v. Lee Gov.* 3 Call, 421; *U. S. v. Morgan*, 3 Wash. C. C. 10; *State v. Bartlett*, 30 Miss. [1 Geo.] 624; *Monteith v. Com.*, 15 Grattan, [Va.] 172; *Barnard v. Viele*, 21 Wend. 88.)

III. The question put to witness Bostwick by plaintiff as to how much money his examination showed should have been in the

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State treasury on the 10th of September, 1869, should not have been allowed.

IV. The questions put to the witness Blasdel by the defendants should have been allowed and answers compelled. (Const. Art. V, Sec. 21 ; Stats. 1864-5, 135, Secs. 1, 2, 3.)

Robert M. Clarke and A. C. Ellis, for Respondent.

I. It was not error to permit the expert Bostwick to give the result of his examination as to the amount of money which should have been in the treasury on September 10th, 1869. (1 Greenleaf Ev., Sec. 93 ; 1 Phil. on Ev., 433, 434, 454.)

II. The question asked Gov. Blasdel as to the money in the treasury was properly denied, because it was immaterial how many times the board of examiners counted the money in the treasury ; the question was not directed to actual counts by the examiners, but to attempted counts by Blasdel.

III. It was not error to deny the objection to proceeding with the cause for the nonpayment of the docket fee, because the statute requiring such payment is directory merely ; and besides this, the State is not required to pay the docket fee. (18 Johns, 227 ; 28 Miss. 763 ; 4 Cow. 143.)

IV. It is no valid objection that the surety upon the bond is two thousand five hundred dollars more than is required by law, because the additional two thousand five hundred dollars is to the benefit of the sureties, and they cannot therefore complain. (6 Cal. 632 ; 19 Cal. 681 ; 21 Cal. 585.)

V. Though Rhoades was only *de facto* treasurer, the sureties are estopped and the bond may be enforced. (8 Cal. 305 ; 22 Ark. 526 ; 14 Md. 369 ; 41 Miss. 234 ; 5 Ohio, 136 ; 17 Ill. 278 ; 36 Vt. 329 ; 17 Cal. 500 ; 15 Grattan, 172 ; 25 Ark. 108.)

By the Court, LEWIS, C. J. :

Eben Rhoades was elected as his own successor to the office of treasurer of the State of Nevada at the general election held in November, A. D. 1866 ; took the required oath of office at the prop-

er time; received his commission, and tendered a bond for the approval of the Board of Examiners, in accordance with section two of an act entitled "An Act Defining the Duties of State Treasurer," (Statutes of 1866, 37) reading thus: "He shall be commissioned by the Governor, but before such commission shall issue, and before entering upon the duties of his office, he shall take the oath of office prescribed by law to be endorsed upon his commission, and shall execute and deliver to the Governor a bond payable to the State in the sum of one hundred thousand dollars, with sureties to be approved by the board of examiners, conditioned upon the faithful performance of all the duties which may be required of him by law, and for the delivery to his successor in office of all books, papers, moneys, vouchers, securities, evidences of debt and effects belonging to his said office." By section twenty-two of an act entitled "An Act relating to Offices, &c." (Statutes of 1866, 233) he was required to file his bond at some time prior to the Tuesday after the first Monday in January succeeding his election. The board of examiners deeming the first bond tendered by him informal in some particular, refused to approve it. The informality was, however, subsequently remedied; but it appears the bond thus amended was not approved by the examiners or filed by the treasurer until after the day designated by section twenty-two above referred to; and the fifth subdivision of section thirty-five of that Act in terms declares that an office shall become vacant if the oath of office be not taken, or the bond required be not filed at the time so specified. The bond thus filed was given in the sum of one hundred and two thousand, five hundred dollars, with sureties liable in amounts ranging from twenty-five hundred dollars to ten thousand. The State, claiming that a defalcation had occurred in the office during the second term of the treasurer, brought this action on the bond mentioned above; obtained a general verdict for one hundred thousand dollars against him and his sureties, upon which judgment was rendered against each surety for the sum for which he became liable. Defendants appeal.

After the plaintiff had closed its case, the defendant called the late Governor, who constituted one of the board of examiners, and whose duty it was to make a count of the money in the treasury at

stated periods, and propounded to him the question: "From January 1st, 1866 to the 10th of September, 1869, how many times did you, as a member of the board of examiners, attempt to count the money in the State treasury?" Plaintiff objected, on the ground of irrelevancy. Counsel for defendant stated "the object of the question with others to be asked the witness, was to show that the defalcation in question in this action occurred in the year 1866," a time prior, it will be observed, to the time when the bond in suit was given. The Court, however, sustained the objection. This question being ruled out, counsel then asked the following: "Did you, as a member of the State board of examiners, count the money in the State treasury in the year 1866?" This was likewise objected to upon the same grounds, and the objection sustained; the Court saying, in making the ruling, that no inquiry as to any defalcation which occurred in the year 1866 was legitimate or proper in this case, and upon that ground refused to allow an answer to the question. Exception being duly taken, the ruling is here assigned as error; and so we think it. Counsel for defendant, it will be seen, stated that the defense consisted in proof that the defalcation in question occurred prior to the time of the execution and filing of the bond in suit, and that the question was propounded with a view to establish that defense. That such defense was admissible under the pleadings is not questioned, for it was simply a disproof of the case made out for plaintiff, by the establishment of an affirmative fact inconsistent with it.

Now, the expert Bostwick had testified for plaintiff that his examination of the affairs of the treasury extended back to the beginning of the treasurer's first term of office, and the entire deficiency found by him was about one hundred and six thousand dollars. Although his examination appears to have been very thorough, he stated that he was not able to determine when the defalcation occurred, whether during the first or second term of the treasurer. So, also, that officer's chief clerk, who had occupied a position in the office during the entire time of the treasurer's administration, testified that he was likewise unable to ascertain that fact. There was very satisfactory evidence, it is true, going to show that it must have happened at some time subsequent to the twentieth day of Febru-

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ary, A. D. 1869. But suppose the defendants were able to prove, as they proposed to do, that a defalcation to the extent here claimed existed as early as the year 1866; and to follow that up with proof that no money had after that time been paid into the treasury, except from the regular sources of revenue—in other words, establish a defalcation prior to the execution of the bond, and then account for all moneys afterwards received into and paid out of the treasury—would it not be strong evidence that the defalcation really occurred prior to the time claimed by the State, and to rebut the testimony fixing it at a time subsequent to the twentieth of February, A. D. 1869? Certainly it would. Whether the defense suggested could, as a matter of fact, be established, is of no consequence here. Counsel for defendants stated their intention to prove it by the witness on the stand. Certainly, they should have been allowed to do so by any unobjectionable evidence tending to make it out. Of course, the mere proof that a defalcation existed in the year 1866 would amount to nothing, unless it was followed up by proof that none other had occurred, or something equivalent, showing that the deficiency here sued for did not happen during the time covered by the bond. But to show that the defalcation in question occurred in the year 1866, it was first necessary to establish the fact that a deficiency actually existed in that year. The line of defense proposed to be taken by the defendants clearly could not be made out until that fact was proven. If this defense were in some way disclosed by the pleadings, and it was admitted to be good, surely it would not be claimed that the answers sought by the question asked the witness would be open to the objection of irrelevancy, for they were immediately directed to the elicitation of facts tending to make it out. So its relevancy was equally manifest from the statement of counsel showing the nature of the defense. This was the legitimate and proper course to pursue. A question is asked which, under the pleadings, would appear to be directed to proof of an irrelevant fact: objection being made, counsel then states the character of the defense. If the defense proposed be admissible and a question asked, answer to which may tend to bring out a fact bearing upon it, it should be allowed to be answered whether the defense in the case so re-

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lied on be disclosed by the pleadings or the statement of counsel, as in this case. If the case or defense be sufficiently disclosed or stated to show the pertinency or relevancy of the evidence sought or offered, what more should be required? Surely there can be no object in requiring counsel to make a statement of his case under such circumstances, except to show the relevancy or competency of the particular evidence offered, and to enable the Court to rule intelligently upon its admission. If that be disclosed by a general statement of the case relied on, why is it not sufficient? A detailed statement of the several steps whereby a case is to be made out would be utterly useless, if a simple general statement as completely shows whether the evidence offered be relevant. The law does not require vain things. To ascertain whether evidence be relevant or not, it is only necessary to determine whether it has a tendency to establish the case or defense relied on. It cannot be expected that a whole case will be disclosed or made out at once. It is generally made up of distinct facts, the relevancy and force of one depending upon the proof of others; hence, it is often necessary to establish some facts by one witness or character of proof, and other by a different. If, therefore, evidence be offered in any way tending to prove or make out the case of the party offering it, it should be admitted. Whether it has such tendency is often easily determinable when the ultimate fact relied on as making out the case is known. When not sufficiently disclosed by the pleadings, the statement of counsel as to what that may be must necessarily be received. Such is the practice very generally sanctioned by the Courts.

Thus, in the case of *Palmer v. McCafferty*, 15 Cal. 334, which was an action of ejectment with a complaint in the usual form, the plaintiff offered a certain contract in evidence, counsel stating at the time that he intended to prove in connection with it that the defendant entered into possession of the premises and claimed under it. Objection was made that the contract was irrelevant; which being sustained, an appeal was taken. At the time the contract was offered it was certainly not relevant to any fact then proven, and could only become so upon the assumption that counsel would establish the facts which he stated he intended to. What is said by the

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learned Judge delivering the opinion of the Court upon this question, is so entirely pertinent here that we may adopt it as clearly expressive of our own views. He says: "The plaintiff was entitled to introduce his proof in his own order. He was not bound to make his whole case complete by any one item of proof. A case consists frequently of various facts, neither one of which makes it out; and to hold that a party is not entitled to introduce any part until he establishes the whole, is to require an impossibility. All that the Court can ask is that the particular evidence offered conduces to establish any one proposition involved in the issue. It is time enough to pass upon the sufficiency of the proofs after they are all in the cause. There must be a starting place somewhere, and the Court should never reject, merely because unaided by other testimony it is insufficient, if it tend legally to prove any part of the case": and the judgment was reversed.

Say the Supreme Court of Illinois, in *Rogers v. Brent*, 5 Gil. 587: "Most cases have to be proved by evidence of distinct facts neither of which standing alone would amount to anything, while all taken together form a connected chain and establish the issue; and from necessity a party must be allowed to prove his case in such detached parts as the nature of his evidence requires. It would be no less absurd than inconvenient, where proof is offered in its proper order of one necessary fact, to require the party to go on and offer to prove at the same time all the other necessary facts to make out the case. * * * It is the right of the party when he offers evidence in its proper order, which proves or tends to prove any necessary fact in the case, to have it go to the jury; for the reasonable presumption is that it will be followed by such other proof as is necessary for its proper connection; and if it is not, it then becomes irrelevant, and as such, if desired, may be withdrawn from the jury. If there is anything to induce the suspicion that the time of the Court is being trifled with, it may be proper to call upon counsel to state the connection which they expect to give the proposed evidence; but that should ordinarily be avoided, as it is often embarrassing for counsel to anticipate their case in the presence of the opposite party."

Clearly, when it is stated by counsel that he intends to prove a

certain ultimate fact which, if proven, makes out his case, any evidence tending to establish that fact must be relevant ; and if it can be seen that it has such tendency at the time it is offered, it is admissible. Here it was proposed as a defence to locate the defalcature in question, in the year 1866. If that were done, it is admitted it would be a complete defense. And it is perfectly apparent the questions put to the witness Blasdel were pointed directly to the ascertainment of the financial state of the treasury in that year. The immediate answer to the questions would not probably disclose the fact whether a defalcation existed at that time or not, but they were necessarily preliminary to other questions put for that purpose. It would not be good practice to put the direct question whether a defalcation existed, until it were first known whether the witness had some means of knowing the fact and by what means he ascertained it. But if it be said the questions ruled out did not have a tendency to elicit evidence directly tending to establish the defense, and therefore that counsel should have gone further and asked questions or offered evidence tending directly to that end, then it may be answered, the Court rendered that unnecessary by the ruling or decision that no inquiry as to any defalcation which occurred in the year 1866 was legitimate or proper, and ruling out upon that ground the questions propounded to the witness. When a witness is called for the purpose of proving a certain fact, and the Court in ruling out evidence not in itself irrelevant going to establish it decides or informs counsel that proof of such fact will not be admitted, or that it will not be legitimate or proper to make such proof, can it be claimed that counsel must persist in efforts to prove it? Such attempt would generally be deemed rather disrespectful to the Court making the decision, for it could only be made in direct disregard of its ruling. Suppose a witness be put on the stand, and the Court directly informs counsel that proof of the fact offered to be proven by him will not be allowed. Can not counsel stop right there? Nay, would he not be compelled to ; and would not the action of the Court be treated as a decision ruling out evidence of the fact so intended to be proven? We are satisfied it would, and that such is the proper practice. That is virtually this case. The witness was called, and a statement made by the counsel that

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he intended to prove by him that this defalcation occurred in the year 1866, and the Court informed counsel that proof of a certain fact necessary to the making out of that defense would not be legitimate or proper. That, with the ruling accompanying it, was virtually a decision that such proof would not be allowed. Exception was then taken and no further proof was offered as it was manifestly useless, if it were not allowable to prove that fact; for without it the defense could not be made out. Can it be contended that after the ruling so made, and being informed that proof of an indispensable fact would not be legitimate or proper, the defendants should, notwithstanding, persist in an effort to introduce such proof? We think not. A rule should not be established or countenanced requiring counsel to disregard the decisions of the Courts made against them during the progress of a trial.

We are aware that in the case of *Baker vs. Preston*, 1 Gilmer, 135, it was held that the entries in the books of a State treasurer were conclusive upon him and his sureties, to the extent that they would not be allowed to show that any sum, which was shown by them ought to be in the treasury at any given time, was not there. This very singular decision is not relied on by counsel for the State, (although sustaining the ruling of the Court below on this point) perhaps for the reason that they do not consider it law. And surely, were it not for the distinguished ability of the Judge to whom the opinion is attributed, it would not deserve a moment's consideration. That it was rendered by Judge Roane is the only merit which it is possible to discover in it. The fallacy of the position taken by the majority of the Court was very clearly shown by Judge White, in a dissenting opinion of unanswerable logic and crushing force. Little, if anything, can be added to what was said by him in opposition to the conclusion of his associates. Neither has the decision been considered law, if not directly overruled, even in Virginia. Its authority seems to have been questioned in *Mumford et als. v. Overseers of the Poor of Nottoway*, 2 Randolph, 213; and Judge Tucker, in *Craddock v. Turner's Admr.*, 6 Leigh, 124, said that it had not been very acceptable to the profession, and that "It was most ably combatted at the time by one of the most distinguished judges of the General Court then sitting as

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a member of the Special Court of Appeals which decided the case." The case, indeed, stands alone, and is at variance with all the cases we have been able to consult, both American and English. We cannot, therefore, rely upon it as authority here.

In its ruling upon this point the Court below erred, and consequently the verdict and judgment must be reversed. There are other important questions raised and fully argued here, which as they involve the validity of the bond in suit, and the competency of certain evidence, without which the plaintiff will be unable to make out its case, will doubtless be again made in the next trial, if not now passed upon. In justice, therefore, to the parties, they should be disposed of at present; and this we propose to do.

First, it is argued that as the bond was not executed or filed prior to the Tuesday after the first Monday in January, A.D. 1867, succeeding the election, the treasurer's right to the office was forfeited by force of the statute above referred to; and consequently that the bond was simply voluntary and not binding on the obligor or his sureties. In other words, that the term of office for which the bond was given having been forfeited, Rhoades could not and did not hold it by virtue of his second election, but held under the constitutional provision authorizing him to hold over until the qualification of his successor. Not being able to enter upon the term for which the bond was given; it was executed and received by the examiners without authority. In answer to this position assumed by the learned counsel, it will be endeavoured to maintain these propositions. 1st. That Rhoades relinquished all right to hold office by virtue of his first election. 2d. That afterwards he was an officer *de facto* under the election of 1866. 3d. Being an officer *de facto*, he and his sureties are estopped from denying that the bond was legally given; or rather that, so far as the officer and his sureties are concerned, he is to be held an officer *de jure*.

Was all claim to the office under the first term relinquished? Certainly, so far as he could do so, Rhoades abandoned all right to hold under his first election. A commission was issued to and accepted by him evidencing his second election; he took the oath of office as required previous to entering upon the discharge of the duties of the second term, and actually presented a bond to the

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board of examiners for approval within the time required of him, which seems only to have been rejected by the board because not in the form prescribed by them; and afterwards had it amended so as to obviate the objection; and that was afterwards actually approved and filed. Nothing can be clearer than that the treasurer relinquished his first term and claimed to hold the office by virtue of his election in the year 1866. So far, then, as he could surrender the office under the first election, he did so. Furthermore, it is stated in the bond itself that it is executed for the purpose of enabling him to enter upon the office under that election. It cannot very well be said that he continued in office under his first election and qualification, when it is shown that he did all he possibly could to surrender it. That he had the right to relinquish it as he had the right to resign at any time, it seems to us, will not admit of question. This is the same as if he was succeeded by a third person. The law does not recognize the person filling the office, but only the term. So every term of office is in contemplation of law filled by a different person; hence, if it be the same person still, all the acts of qualifications are required of him which are required of a stranger.

2d. These facts, which show the purpose of Rhoades to relinquish the office, accomplish more—they made him an officer *de facto* under his second election. It is admitted he was elected, that he took the oath of office, and was commissioned by the proper authority; thus leaving nothing to be done to make him an officer *de jure* except the filing of the bond prior to the Tuesday after the first Monday in January. These acts give him color of right. It has been frequently held, and may now be taken to be the settled law, that a person discharging the duties of a public officer, under color of right, is an officer *de facto*, and not a mere intruder. “Such an officer,” say the Supreme Court of Connecticut, *Plymouth v. Painter*, “is one who executes the duties of an office under color of an appointment or election to that office. He differs on the one hand from a mere usurper of an office who undertakes to act as an officer without any color of right, and on the other from an officer *de jure*, who is in all respects legally appointed and qualified to exercise the office.” That was a case where a person who had

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been duly elected grand juror for the following year failed for some time to take the oath required, was fined for this neglect, paid the fine, and subsequently took the oath and entered upon the discharge of his duties. It was claimed that the failure to take the oath at the proper time vacated the office, and consequently that his acts as grand juror were void. The Court, however, held that he was an officer *de facto*, and that acts performed by him were legal; saying: "He was plainly more than a mere usurper; he was legally appointed by the town to the office, and was eligible to such appointment; and claiming a right to act under it, took in due form the oath prescribed by law for the office. There would confessedly be sufficient to confer on him a perfect legal title to the office, but for what intervened between the appointment and the taking of the oath. Whatever may be the effect of what thus intervened upon the question whether he could afterwards rightfully become qualified for the office by taking the oath, it is clear that the administration of it, in connection with his previous appointment, gave him at least a color, pretence, or show of right to exercise the office, which is all that is necessary in order to constitute him an officer *de facto*. Even if his previous refusal to take the oath legally disqualified him from subsequently doing so, this effect was not so palpable and obvious as to deprive him of a fair color of right to exercise the office. There was an observance of all legal forms requisite to enable him to act as such officer, and they clearly constituted a colorable title or apparent right. (17 Conn. 587.) In *Pier Co. v. Hannam*, 3 Barn. & Ald. 266, it was claimed that certain acts of one Dyson, as justice of the peace for the liberties of the Cinque Ports, were invalid, because he had neglected to comply with an act of parliament which declared "that no person commissioned as justice of the peace should be authorized to act as such unless he shall have such qualifications as will authorize him to act for a county, and unless he shall have taken and subscribed the oaths and delivered in at some general session to be holden in some one of the Cinque Ports the certificate respectively required to be taken and subscribed and delivered in by persons qualifying themselves to act for counties." Dyson had taken the oath required, but failed to deliver a certificate. By the Court, Abbott, C. J. "We are of

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the opinion that, notwithstanding this omission, his acts as a justice, in the matter in question, were valid."

In *Bucknom v. Ruggles* (17 Mass.) a deputy sheriff, although regularly commissioned by the sheriff, neglected to subscribe the declaration and oaths prescribed by the constitution and laws of the commonwealth to qualify him for the execution of the duties of his office. The validity of his acts being in question, the Court say: "This is an extremely plain case, and depends on principles perfectly well settled. The deputy having received a regular appointment from the sheriff, was an officer *de facto*, notwithstanding his neglect to comply with the provisions of the constitution."

The case of the *People v. Collins*, 7 John, 549, arose upon these facts. A person was elected a commissioner of the highways for the year following. The law provided that before entering on the discharge of his duties, and within fifteen days after his election, he should take and subscribe the oath of office before some justice of the peace, who, within eight days thereafter, should certify and deliver it to the town clerk; and that if he should not take and subscribe such oath, the neglect should be deemed a refusal to serve in such office. The commissioner alluded to neglected to take the oath thus required; and when he afterwards laid out a survey of a road, the town clerk refused to record it. Upon an application for mandamus to compel the recording, it was claimed that the failure to take the oath within the time designated by statute, vacated the office; but by the Court: "Nor is the allegation material in this case, that the commissioners had not caused a certificate of oath of office to be filed in the town clerk's office. If the commissioners of highways acted without taking the oath required by law, they were liable to a penalty; or the town, upon their default in complying with the requisition of the statute, might have proceeded to a new choice of commissioners. But if the town did not, (and it does not appear that they did in this case) the subsequent acts of the commissioners, as such, were valid, as far as the rights of third persons and the public are concerned in them. They were commissioners *de facto*, since they came to their office by color of title." *Monteith v. The Commonwealth*, 15 Grattan, 172, was an action on the official bond of a sheriff, who was elected to suc-

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ceed himself, and failed to qualify within the time prescribed by law. The statute made it the duty of the defendant in that case, before entering upon the discharge of his duties, to take an oath of office and give such official bond as might be required of him by the County Court, within sixty days after his election ; and it further provided, that in case of a failure in these particulars the office should be deemed vacant. Monteith failed to execute the bond required of him, within the sixty days succeeding his election. Upon suit being brought upon the bond given by him, after the time designated by law, the question among others was made, whether Monteith, who continued to discharge the duties of the office, was an officer *de facto*. Say the Court of Appeals: " Was not Monteith after he gave bond and entered upon the discharge of the duties of the office, sheriff *de facto* ? If he were not in all respects an officer *de jure*, because of the failure to qualify and give bond in the time prescribed, was he a mere usurper, undertaking to act without any pretence or color of right ? This cannot be maintained upon the facts in the record. He had been regularly elected ; from that election he derived his title to the office ; no commission was necessary to perfect it ; the law required none, and in practice no commission issues. The subsequent steps of the officers conducting the election are only intended to authenticate the fact of such election, and the qualification and bond do not confer the office, but are preliminaries to his entering upon the discharge of the duties of the office to which he has been elected. Asserting such title to the office, he executed and acknowledged the bond required by law before the tribunal authorized to take the official bond of sheriffs. The condition of the bond so executed recites that he hath been elected sheriff of the County of Stafford for the term of two years, commencing from the first of January, 1857, and binds him to the faithful discharge of the duties of his office aforesaid, according to law, thus showing that he claimed to act under the title conferred on him by election, and gave bonds to execute the duties of the office, to which he asserted a legal right." Upon these facts the Court held the sheriff to be a *de facto* officer. Certainly, that case is no stronger upon the law or facts in favor of the conclusions arrived at by the Court than this.

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Being an officer *de facto* and not a mere intruder or usurper, he and his sureties are estopped by the recitals in the bond to deny that Rhoades was entitled to the office, although it would be otherwise if he were a mere intruder. This bond contains this recital: "Whereas, at a general election held in the State of Nevada, on the sixth day of November, in the year of our Lord one thousand eight hundred and sixty-six, Eben Rhoades was duly elected to the office of treasurer of the State of Nevada for the term of two years from the first Tuesday after the first Monday of January, A. D. 1867, and whereas, the said Eben Rhoades is required by law to file an official bond in the general sum of one hundred thousand dollars previous to entering upon the duties of said office"; and concludes in the ordinary form. Now, can the obligor or his sureties rely upon the defense that at the time this bond was given the office had been forfeited, and that Rhoades could not legally enter upon the duties thereof under the election by virtue of which he claimed the right to enter? We think not. Rhoades was claiming the office by virtue of his election in 1866; had taken the oath preparatory to entering upon it; and the sureties also by the recitals in the bond in effect assert his right thereto. This estops them now from asserting the contrary. Here also the authorities are numerous, and we find many almost identical with this case so far as this point is concerned. Thus, in the case of *Monteith v. The Commonwealth*, referred to above, the Court held that the sureties on the sheriff's bond, although given after the time limited by the statute, were estopped to deny that the sheriff was entitled to the office as of right, and the action on the bond maintained; although it appears to have been conceded that the obligor forfeited his position as an officer *de jure* by the failure to file the bond within the proper time; the Court saying: "If the sheriff is an officer *de facto*, it is not for him to deny the validity of his title, or to say that he is not sheriff *de jure*, or that the Court had no authority to take his bond. When the Court recognized the validity of his title, whether they erred or not, they were acting within their jurisdiction in requiring the bond; for the law makes it the duty of the Court to take such bond from the sheriffs elected. The title by election so recognized subsists until the party is ousted, and while

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it does exist the Court may rightfully require the bond. Whenever it is conceded that he is an officer *de facto*, it is also conceded that the office is full. He cannot deny that he is sheriff *de jure*: and concede him to be an officer, the law makes it the duty of the Court to require bond. In this case there is no question that the bond is in proper form, taken by the proper tribunal, and that it was given by him as sheriff for a specified term for which he was elected. It would be most unjust to the public and to individuals who must rely on this bond as their security for the due performance of the duties of his office, to permit him now to controvert the truth of his own assertions. Nor can I perceive any better ground upon which the sureties can stand. If the bond is valid as to him, it is equally so as to them. The fact of election is proven by the recital in the condition, and admitted in the agreement of facts. And the recital shows the bond was taken and received by virtue of such title; and this it seems to me they are estopped from denying, even if the agreement of facts did not show the election."

We have quoted thus at large from the opinion of the learned Judge, because almost every sentence seems apt and pertinent to this case, and the conclusion arrived at by the Court in that is a clear authority in favor of the validity of the bond here sued on.

The Supreme Court of Vermont, held in the case of the *State v. Bates et als.*, 36 Vt. 387, which like this was an action on the bond of the State treasurer, that although the officer had failed to qualify as required by the constitution, and consequently only held the office as an officer *de facto*, his sureties were holden as if he were an officer *de jure*. See also *Town of Linden v. Miller*, Id. 329. The Supreme Court of Illinois, in *Green v. Wardwell*, 17 Ill. 280, say upon this head: "The other question is, if possible, attended with less difficulty. The public is not bound to inquire into all the technical questions which may affect the right of the officer to the office which he holds. Although he may have been elected by illegal votes, or may have been ineligible to the office; although the great seal of State may not have been impressed upon his commission; or although even no commission at all may have been issued to him; or although he may never have taken an official oath; or although he may have been elected to the Legislature, which is an office incom-

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patible with that of justice of the peace; still, so long as he continued to discharge the duties of a justice of the peace, and held himself out to the world as such, his official acts were binding, not only upon suitors but also upon his sureties, and they continued bound upon their obligation. By signing his bond they acknowledged his right to the office and to discharge its duties, and as such recommended him to the public. They, at least, shall not be heard to say, that although they signed his bond, and thereby induced others to put money in his hands, relying on their bond for its safety, still he was not elected, was not commissioned, was not sworn; that he was not, in fact, a justice. If he had ceased to be a justice, the plea should have shown how he had ceased, so that the Court, seeing the facts, could determine as a matter of law whether or not he was still a justice. While he acted as such, and as such collected this money, he must be regarded as an officer *de facto*, although, as the plea states, he had been elected to another office, which, in point of law, rendered him ineligible to the office of justice of the peace."

To the same point *Marshal v. Hamilton*, 41 Miss. 229. *Morris v. The State*, 22 Ark. 524, was an action on a sheriff's bond, the defense being made by the sureties that the sheriff had vacated his office by not filing a bond as required, and consequently that they were not holden; but say the Court: "By the condition of their bond the defendants acknowledged that Morris was sheriff of Ashley County on the twenty-third day of February, A. D. 1856, and the law will presume him to have continued such till October, 1856, two years from the time for his qualification in 1854. To admit the defendants to insist that Norris vacated his office by not giving bond till the date of their bond, would be to allow them to deny what their own acknowledgment under their hands and seals estop them from denying."

In the *People v. Jenkins*, 17 Cal., the same rule was applied to a case where the sureties on the bond of a county assessor sought to avoid responsibility on the ground that the assessor's election was absolutely void. The Court disposed of the defense in this manner: "The principal obligor and his sureties are in no condition to question the regularity of the election of the principal, or

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his responsibility for acts done in an official capacity. The principal had at least the 'color of office by his appointment, and the bond estops him and his sureties signing it from denying his official character.' " These authorities are squarely opposed to the ground taken here, that the failure to execute the bond within the statutory time released the sureties. They have precluded themselves from saying that the person, for the faithful discharge of whose official acts they became sureties, was not of right entitled to perform such acts. The authorities cited on behalf of defendants are not adverse to this conclusion. It will be found upon examination, either that the person for whom the bond was given was a mere intruder, not deemed an officer *de facto*, and consequently not estopped from showing that he was not an officer either in fact or of right; or where the bond was given under circumstances rendering it utterly null, but still free from all elements estopping the parties to it from showing such to be the case. Bonds like this are sustained upon a strong current of authorities holding that a person being an officer *de facto* is not permitted to show or rely upon the fact that he was not an officer *de jure*, for the purpose of attacking or setting aside anything which he may have done in his official capacity. And upon like reason his sureties are also estopped. Where there is no element of estoppel, or the reason for the rule does not exist, of course it should not be applied. The absence of the circumstances constituting an estoppel is the distinguishing feature between the cases cited for the defendants and those sustaining the conclusion at which we have arrived.

The second objection to the validity of this bond is that it is given for the sum of one hundred and two thousand, five hundred dollars, whereas the statute only requires a bond for one hundred thousand. It is not claimed that the board of examiners in any way required the treasurer to give a bond in a sum greater than the law required. Giving it in excess of the sum fixed by statute was purely a voluntary act on the part of the obligor and his sureties. The law required a bond in the penal sum of one hundred thousand—they chose to give one for a sum twenty-five hundred dollars in excess of that required. Now, upon what legal principle can it be claimed that because these persons voluntarily chose to give the State

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a larger security than it demanded, they are not holden even for the amount in which the bond was required to be given? The fixing of the amount in which the bond shall be given is very clearly for the protection of the treasurer—to guard him against the requirement of excessive security; but there is nothing in the statute in any wise prohibiting him from giving or the examiners from accepting a greater, should the treasurer voluntarily choose to offer it. It seems to us the State is fully as free to accept and the treasurer to give, if he choose to do so, a bond in a sum over one hundred thousand dollars, as if there were no limitation whatever in the statute. If the fixing of the penalty of the bond be for the benefit of the treasurer, he can waive it, and did so in this case, by voluntarily offering one in a penalty exceeding that required. Will it be claimed that an undertaking on appeal, or in attachment, if given for a greater sum than the statute requires, will be invalidated? Certainly, we think not. It would at once be suggested that it was a matter resting entirely with the person executing the undertaking to give it for a greater sum than the law made it incumbent upon him to give. Surely, it would be a novel proceeding on the part of an officer to refuse a bond in the statutory proceeding for the claim and delivery of personal property, or in attachment where the defendant claims a return of the property, upon the ground that it is given in treble instead of double the value of the property. A defense of that kind by the obligor or sureties on bonds of that character would not be listened to for a moment. But why more so, when made to a bond of this kind? There is no apparent legal reason why the rule applicable in the one case should not be equally so in the other. The first case relied on by the learned counsel for appellant as opposed to this view is *United States v. Morgan*, 3 Washington C. C. R. 10, in which there were several particulars in which the bond did not conform to the statute: among others, it is true, the Court say that if taken for a greater sum than the law required, it might avoid it. There are, however, many distinguishing features between that case and this; but it is only necessary to mention one, which is that here the making of the penalty more than the statute required was the voluntary act of the obligor and his sureties; but in the case re-

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ferred to, it was admitted by both parties that the conditions and penalty of the bond were not voluntary on the part of the obligor. That the Judge delivering that opinion would not apply the law of that case to a bond where the departure from the statutory form or requirements is the voluntary act of the obligor, is manifest from the fact that subsequently, in the case of *Speake v. The United States*, 9 Cranch, 28, on a similar bond under the same statute he concurred in the opinion of the majority of the Court, wherein it was directly held that the taking of an embargo bond for a sum greater than the statute required did not invalidate it. The other case, that of *Stewart v. Lee*, 3 Cal. seems to favor the proposition that a statutory bond given for a greater sum than required by law would be void. The report of the case, however, is meager and unsatisfactory to such an extent that it can hardly be received as authority on this point. We conclude the bond is not vitiated by reason of being executed for a sum greater than the law required. The disposition of this point also disposes of the objection made to the introduction in evidence of the commission of Rhoades, for if he and his sureties could not deny that he was an officer *de jure*, the commission was a step in the proof that he was such, and consequently was admissible.

Upon the trial the defendants moved to dismiss the action, upon a showing that the docket fee had not been paid as required by Secs. 1 and 2, Statutes of 1864-5, 406, the first declaring that "At the time of the commencement of every civil action or other proceeding in the several district courts of this State, the plaintiff shall pay the clerk of the court in which said action shall be commenced the sum of five dollars in gold or silver coin," and the second section, that "No such action shall be deemed commenced, proceeding instituted, or appeal perfected, until the said fees shall be paid as aforesaid." The motion was denied, and the ruling is now assigned as error. But it is clear the Legislature never intended to include actions by the State in the sections referred to. The fee being a tax imposed solely for revenue, upon well settled rules of law the State could not be included unless expressly named. It is a rule of the common law, that generally the king is not in his royal character bound by statute in which there are not express

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words binding him. Comyn's Digest, title Parliament, R. 8. There are it is true many exceptions to this rule, but it has been expressly held that he is not included in an act imposing a tax or duty, so Comyn tells us. Id. And that was directly held by the King's Bench in the case of the *King v. James Cook*, 3 Term R. 519. The case arose upon these facts. The statute 25, Geo. III, C. 50, f. 4, enacted that "for and in respect to every horse hired by the mile or stage to be used in traveling post, there shall be charged a duty of one and one-half pence for every mile such horse shall be hired to travel post"—and the fifteenth section declared that the postmaster shall ask, demand and receive of and from the person or persons hiring the same the sum of one and one-half pence per mile." It appeared that the defendant was a postmaster and innkeeper, and was duly licensed to let to hire, horses for the purpose of traveling post. A package addressed to the postmaster general was brought and delivered to him to be forwarded to London. The defendant, immediately on receiving the letter, forwarded the same by a man and horse to its destination. It appeared that the postmaster general paid the expenses of the post out of the revenue of the post-office, and that the defendant was allowed at the rate of 3 d per mile for carrying the package. The defendant, having failed to make an account of this hiring as the law required, he was convicted and fined. The King's Bench reversed the conviction; Lord Kenyon, in delivering the opinion of the Court, saying, after referring to the sections of the statutes above quoted: "Now, in this case who can said to be the person hiring the horse? The packet was sent for the use of Government, and it passed through the hands of the different postmasters, who forwarded the express in consequence of an official duty incumbent upon them. But they cannot be said to be the persons hiring the horses within the meaning of the act. My opinion proceeds on the ground that this was on the service of Government; and the case states in express terms that the packet contained a letter directed to one of the principal secretaries of State, and that it was not on any private business whatever, but wholly related to the public concerns of the kingdom. Now, although there is no special exemption of the king in this Act of Parliament, yet I am of opinion that he

is exempt by virtue of his prerogative in the same manner as he is virtually exempted from the 43d Eliz., and every other act imposing a duty or tax on the subjects. And I understand that the horses carrying the mail were never deemed liable to post-horse duty." The common law upon this head is held to apply with equal force to the several States, and also to the Federal Government, as to the king in England. Says Judge Story, in the *United States v. Hoar*, 2 Mason, 314: "But independent of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail founded upon the legislative intention. Where the Government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed or the language used, that the Government itself was in contemplation of the Legislature, before a Court of law would be authorized to put such an interpretation upon any statute. In general, acts of the Legislature are meant to regulate and direct the acts and rights of citizens; and in most cases the reasoning applicable to them applies with very different and often contrary force to the Government itself. It seems to me, therefore, to be a safe rule, founded in the principles of the common law, that the general words of a statute ought not to include the Government or affect its rights, unless that construction be clear and indispensable upon the text of the Act." See also, *The People v. Gilbert*, 18 Johnson, 227. So, in accordance with this rule, it was held in the case of the *People v. Rossiter*, 4 Cowan, 143, that the State was not bound by the provisions of a Bankrupt Act, unless expressly named. Certainly, there is nothing in the text of the Act referred to, except the mere generality of the words that the fee shall be paid at the "commencement of every civil action," from which it can be presumed the Legislature intended to include the State. And a tax levied by the State upon itself, or its own transactions, is so anomalous that it cannot be supposed it was intended, unless upon the clearest language. A more appropriate application of the rule of the common law could not be made, than to cases of this kind. We conclude the statute does not include actions instituted by the State.

The objection made to the question propounded to the witness Bostwick is clearly untenable. It was shown that his examination

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of the affairs of the treasury extended over the entire period between the organization of the State and the time of the vacancy caused by the death of the obligor on the bond sued on.¹ His preliminary examination certainly shows a very thorough investigation of the accounts of the office; after which the question, "What was the result of your examination as to the amount of money which should have been in the treasury on the tenth day of September, 1869," was entirely free from the objections interposed, namely, that it called for secondary evidence, and that the examination made by the witness was only partial. As to the first objection, the statute is a sufficient answer. Subdivision fifth of Sec. 427 of the Practice Act of 1869, expressly dispenses with written vouchers, or written documents, "when the original consists of numerous accounts or other documents which cannot be examined in Court without great loss of time, and the evidence sought from them is only the general result of the whole." Such also is the law independent of statutes. (1 Starkie on Evidence, 96.) The second objection is not borne out by the record. The examination of Mr. Bostwick preliminary to asking the question unmistakably shows, not a partial, but a full and complete investigation of the monetary transactions of the treasury during the entire period of Rhoades' incumbency.

Again, it is argued the Court erred in overruling defendants' objection to this question put to the treasurer's clerk: "What amount of money do the entries in the treasurer's books show ought to have been in the treasury on the tenth day of September, A. D. 1869"? The ground of this objection, as stated in the transcript, is "because the entries were not shown to have been made under or by the Treasurer Rhoades, or with his knowledge or in his life time." The statute laws of 1866, page 57, Sec. 4, make it the duty of the State treasurer to keep a just, true and correct account of all moneys received and disbursed by him; and thus the books kept by him in accordance with this statute would clearly come under the head of public records, of which Greenleaf (Ex. Vol. 1, Sec. 484) remarks: "These books, therefore, are recognized by law because they are required by law to be kept; because the entries in them are of public interest and notoriety,

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and because they are made under the sanction of an oath of office, or at least under that of official duty. * * When identified and shown to have come from the proper repository, they are received as evidence without further attestation." Public officers are always presumed regularly and duly to perform the duties imposed on them by law; therefore when books which the law requires them to keep are offered in evidence, all intendments are in their favor; it is presumed the entries were regularly made at the proper time and in accordance with the facts—consequently, if any irregularity, mistake or fraud is claimed to have been committed, the burden of establishing it is on the party relying upon it. (6 Duer, 512.) The treasurer's books very clearly come within the rule above stated, and hence the objection that it was not shown that the entries were made by or under the authority of the treasurer was entirely untenable, for it was not incumbent on the plaintiff to make any such showing, the law presuming such to be the case, if indeed it were at all essential that the entries should have been so made. Manifestly, the objection was not maintainable upon the ground stated.

Judgment reversed and cause remanded.

GARBER, J., dissented.

WILLIAM SHARON, RESPONDENT, v. JOHN MINNOCK,
APPELLANT.

OBJECTION AS TO RIGHT TO EXECUTE DEED NOT OBJECTION AS TO EXECUTION.

Where the only specification of objection to the introduction in evidence of a deed was that the alleged grantor, a corporation, had not been shown to have title: *Held*, not broad enough to cover an objection that the corporate seal had not been proved, nor any authority shown to affix it to the deed.

PARTICULAR GROUND OF EXCEPTION TO BE STATED. The particular ground of an objection or exception taken in the course of a trial is required to be stated, (Practice Act, Sec. 191) so that the court may decide intelligently upon it, and the opposite party be afforded an opportunity of obviating the objection if it be in his power to do so.

OBJECTIONS TO ADMISSION OF EVIDENCE TOO LATE AFTER EVIDENCE ADMITTED.

Where a deed was admitted in evidence under insufficient objections to its val-

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idity for alleged want of title in the grantor; and afterwards, on motion for non-suit, further grounds of exception on account of its alleged want of proper execution were made to it: *Held*, that the latter objections were too late and therefore not available.

FAILURE TO OBJECT TO WANT OF PROOF WHEN WAIVER OF PROOF. Where a deed purporting to be that of a corporation was permitted to be introduced in evidence, without any objection, at the time, that the seal had not been proved, nor any authority to affix it shown: *Held*, a waiver of such proof.

OBJECTIONS TO EVIDENCE TO BE MADE PROMPTLY. An objection to the admission of evidence should always be made at the earliest opportunity after the objection becomes apparent; if apparent when offered, it should be made then; if the evidence, apparently admissible when offered, is shown by subsequent developments to be exceptionable, the objection should then be made in the form of a motion to strike out.

SPECIFICATION OF GROUNDS OF NON-SUIT. The grounds urged for a non-suit are required to be as specifically designated as any other exceptions or objections taken in the course of a trial.

DEED OF CORPORATION — PRESUMPTION OF AUTHORITY TO AFFIX SEAL. Where the seal on a deed purporting to be that of a corporation was proved, or in other words, the deed was admitted in evidence without objection for want of proof of such seal: *Held*, that the presumption followed that it had been affixed by competent authority; and that the burden of proof to show want of authority was upon him alleging such want.

ESTOPPEL IN PARS. To constitute an estoppel in pars it is essential among other things that the party relying on it should have been influenced by the acts or silence of the other, and been caused thereby to act as he would not otherwise have acted; else he cannot complain that he was deceived to his prejudice.

ESTOPPEL MUST BE PLEADED. An estoppel cannot be proved if it be not sufficiently pleaded.

PLEADING OF ESTOPPEL IN PARS. In pleading facts to show an estoppel in pars, it is necessary to set forth every essential element of such an estoppel; and among other things, that the party relying on it was influenced in his conduct by the acts or silence of the other.

RECORD OF DEED, CONSTRUCTIVE NOTICE OF CONTENTS TO WHOM. The record of a deed only imparts notice of the contents thereof to subsequent purchasers and mortgagees, etc., and not to persons who claim by entirely independent right or title.

ERROR WITHOUT PREJUDICE. A judgment will not be reversed on account of an erroneous instruction, if it appear that such instruction was impertinent to the issue, and did no injury to the party complaining.

PRESUMPTION OF CLAIM TO ENTIRE TRACT BY ENTRY UNDER DEED. A person entering upon a tract of land under a deed with definite boundaries, is presumed by the mere act of entry so made to intend to claim the entire tract.

FACTS PROVED AND NOT CONTROVERTED NEED NOT GO TO THE JURY. It is no error for a court in its charge to take from the consideration of the jury a fact proven by one party and not controverted by the other.

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APPEAL from the District Court of the First Judicial District, Storey County.

The property, the subject of this action, is situate in the town of Gold Hill, Storey County, about a half mile northerly from the Devil's Gate Toll House. The verdict and judgment were in favor of plaintiff, for possession of the property and one dollar damages.

The action was commenced in January, 1867, and the appeal taken in December, of that year. The briefs were put in long before Judge Whitman, one of the counsel for plaintiff, took his seat upon the bench.

Williams & Bixler, for Appellant.

I. As there was no proof of the seal, the case is the same as though the deed had no corporate seal, but simply the private seal of the parties executing on behalf of the corporation, and consequently no presumption of authority could arise. The recital in the deed of the resolution purporting to authorize its execution, did not dispense with the necessity of proving it; nor did the fact that the deed was acknowledged before a notary public render it unnecessary to make proof of the seal or of the authority under which it was executed. In consequence of this failure of proof, the plaintiff made out no case. (*Mann v. Pintz*, 2 Sandf. Ch. 271; *Jackson v. Pratt*, 10 Johns. 386; *Foster v. Shaw*, 7 Serg. & Rawle, 162; *Leazure v. Hillegas*, 7 Serg. & R. 318; *Angell & Ames, Corp.*, Sec. 226 and cases cited in note 6; *Hoyt v. Thompson*, 1 Selden, 384; *Tolman v. Emerson*, 4 Pick. 162; *Hart v. Stone*, 30 Conn. 94; *Howard v. Lee*, 25 Conn. 1; *White v. Skinner*, 13 Johns. 310; *Jackson v. Roberts' Executors*, 11 Wend. 425; *Williams v. Peyton's Lessee*, 4 Wheat. 77; *Ellis v. Eastman*, 32 Cal. 449; *People v. Doe*, 31 Cal. 220.)

II. The question here is not as to the admissibility of the deed itself in evidence, but as to its effect when in evidence. (*Palmer v. McCaffrey*, 15 Cal. 335; *Tyler v. Green*, 28 Cal. 409; *Landers v. Bolton*, 26 Cal. 293; *Kimball v. Semple*, 25 Cal. 446; *Gashweiler v. Willis*, a Cal. case not yet reported.)

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III. It was error to rule out the estoppel in pais. (*Parker v. Kilham*, 8 Cal. 77; *Godeffroy v. Caldwell*, 2 Cal. 492; *McGararty v. Byington*, 12 Cal. 429; *Wendell v. Van Rensselaer*, 1 John. Ch. 354; *Carr v. Wallace*, 7 Watts, 394; *Nixon v. Caines*, 28 Miss. [6 Cush.] 414; 3 Paige, 555; *Gatting v. Rodman*, 6 Ind. 289; *Hall v. Fisher*, 9 Barb. 30, 31; 6 Dunn & East, 556; cited in 3 Paige, 555; 44 Barb. 228; 9 Barb. 31; 2 Johns. 588.)

IV. The instruction that the record of the deed from Tyrrell imparted notice to defendant was error. (*McCabe v. Grey*, 24 Cal. 516; *Long v. Dollarhide*, 24 Cal. 227; 15 Cal. 132; 12 Cal. 377.)

V. The instruction as to the effect of the entry under the Tyrrell deed, without reference to any intent to claim the entire tract described, was error. (2 Washburn on R. P. 499; *Fax v. Hinton*, 4 Bibb. 559; *Thomas v. Harron*, 4 Bibb. 563; *Hicks v. Coleman*, 25 Cal. 131.)

B. C. Whitman and *W. S. Wood*, for Respondent.

I. The objections in the motion for non-suit were addressed to the lack of proof of authority to execute deed. They should have been made when the deed was offered — because, if then made, and valid, plaintiff might have been able to supply the deficiency. But as a matter of law, all proofs of the execution were practically waived, no objection of that kind having been made at the time the deed was offered. (Angell & Ames on Corporations, Secs. 223, 225, 226.)

II. There was no error in refusing to admit the testimony offered on the question of estoppel. The pleading and offer lacked one essential constituent element of estoppel, and both were defective in that they both failed to claim any direct reliance upon the act or admission of plaintiff or his grantor, action thereon by defendant, or injury from such reliance. (*Biddle Boggs v. Merced Mining Company*, 14 Cal. 279; *Davis v. Davis*, 26 Cal. 40; *Bowman v. Cudworth*, 31 Cal. 153; *Green et al. v. Prettyman*, 17 Cal. 401; *Turner v. Coffin*, 12 Allen, [Mass.] 401; *Plummer*

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v. Lord, 9 Ib. 447; *Andrews v. Lyons*, 11 Ib. 349; *Fletcher v. Holmes*, 25 Ind. 458; *Lucas v. Harl*, 5 Iowa, 415; *Taylor et al. v. Zepp*, 14 Missouri, 482; *Valle v. Clemens*, 18 Ib. 486.)

III. The Court did not err in giving a construction too broad to the Act concerning Conveyances. The language of the statute is clear and expressive, that the record of a deed shall "impart notice to *all persons* of the contents thereof." The defendant occupies substantially the position of a subsequent purchaser; he is occupying and claiming, so far as he makes any claim, from the same source of title as plaintiff. The instruction as to the effect of entry under the deed was correct. (*Ellicott v. Pearl*, 10 Peters, 441.)

By the Court, LEWIS, C. J.:

This is ejectment for a tract of land situated in the County of Storey, with a complaint in the usual form. The defendant answered, denying all the allegations of the plaintiff's pleading, except the possession by himself, and also alleged facts relied on by him as an estoppel against the plaintiff's right to recover.

Upon the trial, it was proven by the witnesses called on behalf of the plaintiff, that in the month of June, A.D. 1862, one Tyrrell had a small tract of land, embracing about seven acres, surveyed for the purpose of acquiring a title thereto; that he set up fence posts around it, and continued to make claim to it. The plaintiff deraigned title through Tyrrell, by deeds regularly conveying the title from him to certain third parties, some of whom erected a valuable quartz mill within the surveyed boundaries, and continued to occupy it, together with the land in its immediate neighborhood; and finally the entire tract surveyed by Tyrrell was conveyed to plaintiff by a deed purporting to be executed by a corporation known as the Alpha Gold and Silver Mining Company.

To the introduction in evidence of this deed, objection was made by counsel for defendant, upon the ground "that it purported to convey property to which the supposed grantor, named therein, had not been shown to have title." This objection was overruled, and the deed admitted. The defendant still believing the deed open to objection, again upon the close of the case by the plaintiff

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urged his objection upon a motion for non-suit. Upon the ruling of the Court, admitting the deed from the Alpha Company, and refusing a non-suit, only one point is attempted to be sustained by appellant in this Court, namely: that the plaintiff failed to identify or prove the corporate seal, and the authority in the officers to execute the deed; the conclusion arrived at by counsel therefrom being that the deed so admitted in evidence proved nothing, and consequently no title was established in the plaintiff.

The ground of objection to the introduction of the deed at the time it was offered—that is, that it was not shown that the grantor had any title to convey—is entirely abandoned in this Court. We may, therefore, proceed to the inquiry whether, under the objection thus stated, the appellant can now rely upon the failure to prove the seal or authority for the execution of the deed, in support of the objection. We are satisfied he cannot. The ground of objection, as stated in the Court below, had no reference to, nor was it in any wise connected with, the point now taken by counsel. It would be unjust to the Court below and to the opposite party, to reverse a ruling admitting or rejecting evidence upon a ground in no way suggested at the time of objection, and upon which the Court was not called upon to decide. Such practice we think clearly prohibited by the following sections of the Practice Act, Sec. 190: “An exception is an objection taken at the trial to a decision upon a matter of law, whether such trial be by jury, court or referees; and whether the decision be made during the formation of a jury, or in the admission of evidence, or in the charge to a jury, or at any other time from the calling of the action for trial to the rendering of the verdict or decision. But no exception shall be regarded on a motion for a new trial or an appeal, unless the exception be material, and affect the substantial rights of the parties.” Sec. 191: “The point of the exception *shall be particularly stated*, and may be delivered in writing to the judge, or if the party require it, shall be written down by the clerk * * * .”

Here it will be observed that the particular ground of objection or exception is required to be stated. To what end? Evidently, that the Court may decide intelligently upon the legal proposition or rule relied on, and to afford the opposite party an opportunity to ob-

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viate the objection, if it be in his power to do so. For example: in this case, had the point of objection to the introduction of the deed, now relied on by counsel, been made at the time, the objection could probably have been obviated by the necessary proof of the corporation seal. When this requirement of the statute is not complied with, the objection will not avail. This conclusion seems not only warranted by the Practice Act, but is the uniform rule of practice adopted by the Courts. (*Frier v. Jackson*, 8 John, 496; *Waters v. Gilbert*, 2 Cush. 27.) In *Kiler v. Kimball*, 10 Cal. 267, it is said: "To entitle an objection to notice, it must not only be on a material matter affecting the substantial rights of the parties, but its point must be particularly stated." The party, as the authorities say, must lay his finger on the point of his objection to the admission or exclusion of evidence. The appellate Court will consider objections only upon the grounds specified in the Court below (14 Cal. 549; 20 Johnson, 357). Under the objection and exception taken to the admission of the deed in evidence, the point argued in this Court cannot, under the statute and rule of these cases, be considered; because it in no wise called the attention of the Court below to the point now made, and gave it no opportunity to rule upon it.

But it is argued, if the objection and exception to the admission of the deed are not sufficiently specific, the grounds specified in support of the motion for non-suit are so. The grounds upon which the motion was made are these. 1st. That there was a failure on the part of the plaintiff to show any right or title in himself to the premises in controversy. 2d. That plaintiff had not shown that he succeeded to the supposed title of those through whom he claimed. 3d. That no authority was shown from the Alpha Gold and Silver Mining Company, the supposed grantor in the last mentioned deed, for the execution thereof to the plaintiff, and that no resolution was produced or shown of the said corporation or its board of trustees, authorizing or directing the execution of said deed, and that the recital of the passage of such a resolution in the deed was no proof of the passage thereof, or of its existence."

If it be admitted that these grounds are sufficiently specific to apprise the Court and the opposite party of the precise point now relied on, still it is very questionable whether it was available upon

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motion for non-suit. We are inclined to think it was not. The deed appears upon its face to be the deed of the Alpha Gold and Silver Mining Company to the plaintiff, and was offered in evidence as such. Now, what was the effect of permitting it to be introduced without making the objection that the seal had not been proven or the authority to execute it shown? Clearly a waiver of such proof—an admission that the deed was what it purported to be, the deed of the Alpha Company. Had the objection been made when the deed was offered, that the seal had not been proven, as should have been done, it must be presumed the Court would have required proof of that fact, or excluded the instrument: but the objection was not made. What, under the circumstances, was the natural and legitimate inference? What, but that the defendant waived the preliminary proof which he might have required. Was not his silence when he should have objected as distinct an admission that the deed was what it was claimed, and what it purported, to be, as if the admission were verbally made? This presumption of a waiver of a right, or assent to an irregularity, from a failure to interpose objection at the proper time, is universally recognized by the Courts, and applied to every step taken in an action, from the beginning to the end. Thus, a general appearance waives all defects in the summons, and the defendant is afterwards not allowed to take advantage of them. By trying a case before the Judge, he waives his right of trial by jury. The failure to challenge at the proper time is taken to be an acceptance of an incompetent juror, and the objection cannot subsequently be made. The failure to except to the admission of incompetent testimony is held to be an assent to its admission, and proof of a fact by secondary evidence without objection precludes the right to make it at any subsequent stage of the trial. Why, then, did not the failure to object to the introduction of the deed in this case, on the ground here made, amount to an admission of the fact that the instrument was the deed of the corporation? We are satisfied that such was the result. Can it then, with any degree of reason, be claimed that the objection could be raised after the plaintiff had closed his case, and possibly his witnesses had gone beyond his reach? Objection to evidence must always be made at the earliest opportunity after the objection

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becomes apparent. If apparent when offered, the objection should then have been made. If apparently admissible when offered, but it is subsequently developed that it was not, a motion should be made to strike it out when such development is made.

If, as we think, the failure to make the objection at the time the deed was offered amounted to an admission that it was the deed of the corporation, certainly a subsequent denial of that fact would not be allowed, any more than it would if expressly made. In all the cases mentioned above, the waiver of an irregularity absolutely precludes the party from afterwards making the objection. After a party has appeared in a manner so as to waive a defective summons, he is not allowed subsequently to take advantage of the irregularity. So, indeed, in all cases of the waiver of a privilege or right.

If our views on this point be correct, the defendant could not upon the motion for non-suit avail himself of the failure to prove the corporation seal; unless, indeed, without such proof the plaintiff's case were not made out, which can hardly be claimed; for the deed, when once admitted without proof of the seal, as fully and completely established a conveyance from the Alpha Company to Sharon of the premises described in the instrument, as if the preliminary proof had been properly made. Proof of the seal could not add a jot or tittle to the conveyance itself. The deed upon its face purports to be the deed of the Alpha Company; so, even if the proof of the seal was not in fact waived by the appellant, yet the deed being received in evidence and not taken from the consideration of the jury, could very properly be held to be what it purported to be. But, as we have already said, the failure to object at the proper time was tantamount to an admission that it was the deed of the Alpha Company, and so dispensed with the proof of the seal.

However, it will be seen that that particular ground was not suggested, even on the motion; and such designation is as essential upon motion for non-suit as at any other time. The first and second grounds are sufficiently general to include any defect or failure of proof in the plaintiff's title. They do not in the remotest manner designate the failure to prove the corporation seal as a ground of the motion. Still, if we are correct thus far, that would not have

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been a tenable ground upon the motion, even if made; because, as we have shown, such proof was dispensed with by the admission of the deed without objection. But is their third ground available? We think not. It was evidently taken and founded on the belief that it was necessary for the plaintiff to show authority of the officers who executed the deed. The failure to show such authority was manifestly the only point sought to be raised by this ground. Yet the failure to prove the authority of the officers executing the deed does not reach the point that there was a failure to authenticate the seal. The authority to attach a seal, and the proof of the seal itself, are distinct and independent facts, requiring very different character of evidence. The seal itself might be identified or proven, whilst there might be an entire failure to establish the authority to attach it to a particular instrument. The third ground here taken simply looks to a failure in this latter particular. Hence, the particular point that the seal was not identified or proven does not appear to have been raised or taken in the Court, nor an opportunity given to rule upon it. It cannot, therefore, be made in this Court.

But is it a fact that there was a failure to prove authority to execute the deed? If so, that might entitle the appellant to a new trial upon this third ground of motion. The seal having been admitted to be the seal of the Alpha Company by the failure to object to the admission of the deed, nothing further was required; for it is a settled rule of law that the seal itself being proven, the presumption follows that it was attached by competent authority—that is, the seal proves that it was attached by proper authority, and if not so attached, the burden of showing that fact is by proof of the seal thereon upon him who relies upon the want of such authority. (See Angell & Ames on Corporations, 224.) We conclude the motion for non-suit was properly overruled by the Court below.

The second assignment of error is, that the Court erred in ruling out certain evidence offered by the defendant for the purpose of establishing an estoppel *in pais* against the plaintiff. The allegation in the answer under which this evidence was offered is as follows: "Defendant further says that he and his co-tenant have, at a large expense, to wit—the sum of one thousand dollars—erected

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upon the premises aforesaid sluices, tanks, and other works necessary to carry on their said business of mining. That he and his co-tenant were engaged for a considerable time in erecting and making their said improvements; and that during the time they were making said improvements, those through and from whom plaintiff claims title to the land described in his complaint had full knowledge of the same, and saw defendant and his co-tenant daily at work upon said premises, and knew that they were making large expenditures thereon, and knew that the defendant and his said co-tenant in good faith believed themselves the true and rightful possessors and occupants of said premises, and that they were entitled to hold and possess the same against all the world, except the Government of the United States; and under that belief were making the expenditures and improvements aforesaid in good faith: and yet said persons, from and through whom plaintiff claims as aforesaid, during the whole of said time, failed and neglected to give defendant or his co-tenant any notice whatever of any right or claim on their part to said premises, or any part thereof; but on the contrary encouraged this defendant and his co-tenant in the belief that they were the rightful possessors and occupants of said premises."

Plaintiff contends that this allegation does not state facts sufficient to constitute an estoppel, and upon that ground objected to the proof offered under it. The particulars in which it is claimed to be defective are the absence of a showing that the defendant was misled, or induced by the silence of the plaintiff's grantors to act differently from what he would have done had he been notified of their claims of right; and also the absence of an averment that he and his co-tenant were in fact ignorant of the claim of the plaintiff's grantors.

It is not denied that if the estoppel is not sufficiently pleaded it should not be proven; for evidence to establish facts should never be allowed if, when proven, they would not constitute a defense. It is only necessary, therefore, at present to ascertain whether the facts alleged in the foregoing count of the answer constitute an estoppel. Nelson, J., in the *Welland Canal Company v. Hathaway*, 8 Wend. 488, defines an estoppel in this way: "As a general rule a party will be concluded from denying his own acts or admissions,

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which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter."

In *Dizell v. Odell*, 3 Hill, Judge Bronson says: "Before the party is concluded, it must appear: 1st, That he has made an admission which is clearly inconsistent with the evidence he proposes to give, or the title or claim which he proposes to set up; 2d, That the other party has acted upon the admission; and 3d, That he will be injured by allowing the truth of the admission to be disproved."

In *Carpenter v. Stilwell*, (11 N. Y. 61) counsel for defendant asked the Court to instruct the jury, "That if they believed the plaintiff knew that the judgment creditors had received the money and the judgment had been assigned, and that the property was advertised to be sold, and then endeavored to have the sale deferred, and did not give notice to the purchaser at the time of the sale, he is to be deemed as having acquiesced in the right to sell, and is estopped from setting up that there was no right or authority to sell." This charge the Court refused to give, and the Court of Appeals sustained the ruling, placing its decision among other grounds upon this, that "there was no showing that the purchaser in making the purchase, or the defendant Stilwell in acquiring the rights of the purchaser, was at all influenced in his actions by the conduct or declarations of the plaintiff."

Chief Justice Redfield, in *Strong v. Ellsworth*, 26 Vt., thus defines an estoppel *in pais*: "The doctrine of an estoppel *in pais* is one which, so far at least as that term is concerned, has grown up chiefly within the last few years. But it is and always was a foundation principle in the law of contracts. It lies at the foundation of morals, and is a cardinal point in the exposition of promises, that one shall be bound by the state of facts which he has induced another to act upon. He who by his words or his actions, or by his silence even, intentionally or carelessly induces another to do an act which he would not otherwise have done, and which will prove injurious to him if he is not allowed to insist upon the fulfillment of the expectation upon which he did the act, may insist upon such fulfillment. And equally, if he has omitted to do any act trusting

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upon the assurance of some other thus given, and which omission will be prejudicial to him if the assurance is not made good, he may insist it shall be made good."

Again, the same Court in *Wooley v. Edson*, 35 Vt. 218, says: "The defendants claim that the plaintiff, by reason of what he said and did at the time the oxen were attached, and taken out of his possession by the defendants, and his omission at that time to assert any title or right to the oxen in himself, is now estopped from asserting any title in himself against the defendants. A satisfactory answer to this claim is found in this, that the case fails entirely to show that the defendants, in making the attachment of the property or in the subsequent disposition of it, were in the slightest degree influenced by what the plaintiff said, or did, or omitted to say or do, or that they were in any manner prejudiced thereby. In all the cases which are to be found upon this subject of equitable estoppels, or as more commonly expressed, estoppels *in pais*, this is held to be the essence and reason of the whole doctrine: that where one by his act, or statement, or conduct, has induced another to act upon it, he cannot afterwards be permitted to assert the contrary to the injury or prejudice of the party who has already acted upon the faith and in the belief created by him."

Say the Supreme Court of Massachusetts: "Now it is an essential element in such estoppel that one party has been induced by the conduct of the other party to do, or forbear doing, something which he would not, or would, as the case may be, have done but for such conduct of the other party." (6 Cush. 214.) Again, in *Morton v. Hodgden*, 32 Maine, 127, it is held that a disavowal by the owner of any title to personal property will not preclude him from setting up his ownership, even as against the party to whom the disavowal was made, unless the conduct of such party was influenced by it." (See also *Eldred v. Hazlett*, 33 Pa. 307.)

It will be observed from these cases that to constitute an estoppel *in pais* it is essential, among other things, that the party relying on it should have been influenced by the acts or silence of the other. It must appear that the acts or conduct of the party estopped caused the other to act as he would not otherwise have done, else he cannot complain that he was deceived to his prejudice. No

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matter how repugnant to the rules of ethics, or how deceptive or fraudulent may be the conduct of a party, if it be not the motive, inducement or moving cause of action by another, there is no estoppel. That the person relying upon an estoppel was induced by the conduct of another to act differently from what he otherwise would have done, is a constituent element of an estoppel *in pais*, and there is no estoppel when such is not the case. What follows? That such fact must be made to appear by the pleading. If it be an essential element of estoppel, it is necessary to plead it. If not pleaded, although the other essential facts were set out, no estoppel would be made out. This is the case here. There is not a word in the answer showing that the course pursued by the defendant was in any way influenced by the silence of the plaintiff. Nothing, from which it can be inferred even that he would not have done precisely the same thing had he been warned by the plaintiff's grantors; nor, indeed, does it appear that he was not fully informed of their claim when he was making the improvements referred to. How is the Court to know that he would not have taken precisely the same course he did, even with a full knowledge of the claim of the plaintiff's grantors? There is no direct allegation from which that conclusion can be drawn: and even if there be allegations from which such conclusion could be arrived at *arguendo*, still that would not avail, for argument by the Court to whom a pleading is submitted is not pleading. We conclude, then, that as the estoppel *in pais* relied on by the defendant was not sufficiently pleaded, or rather as the facts alleged do not constitute such estoppel, no proof could properly be admitted under it. The testimony offered under this allegation of the answer was therefore properly ruled out. The third assignment of error is founded upon the instructions given by the Court to the jury at the request of the plaintiff, namely: First, the deed in evidence from Tyrrell to Land and others is acknowledged and recorded as provided by the Act concerning Conveyances of the late Territory of Nevada, approved November 5th, 1861.

Second: "Under the provisions of said Act, such deed so recorded, from the time of filing the same with the recorder for record, imparted notice to all persons of the contents thereof." This

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latter instruction was undoubtedly wrong, as claimed by counsel for appellant. The defendant was not claiming from Tyrrell and others, but entirely independent of them. In such case, the record of a deed from Tyrrell and others could not operate as notice to the defendant. Such was the construction placed upon an identical act prior to its adoption in this State. See *McCabe v. Gray*, 20 Cal. 516, and also 24 Cal. 227, where it is held that the record only imparts notice to subsequent purchasers and mortgagees, according to the language of the statute itself. But we are unable to see how this instruction could possibly prejudice the defendant. The notice, or want of notice, that the plaintiff or his grantors claimed the premises, could not possibly affect any claim which the defendant might make to it in the way of location; for if the plaintiff or his grantors had a title, the defendant could get none by mere location, even if he had no notice of their claim; and if they had no right, the notice of their claim of right could not affect his right to locate or take it up. Had the testimony tending to make out an estoppel been admitted, the instruction might have had a very material bearing on the case to the prejudice of the defendant. That, however, not being the case, the instruction was simply impertinent, having no bearing upon the real issues; and hence, although announcing an incorrect rule of law, still as no injury could result therefrom to the appellant, it is not such error as entitles him to a reversal of the judgment.

Lastly, it is argued the Court misdirected the jury, in charging them, that "If they believe from the evidence that Land, Steir and Company entered upon the tract of land described in the Tyrrell deed under such deed, and thereafter occupied and improved any portion of such land, the limit and extent of their possession will be defined by the boundaries contained in said deed, and they and their grantees would be entitled to hold to such boundaries as against any person not in the actual possession in good faith of such land, or a portion thereof, at the time of such entry." It is claimed that this instruction is defective in one essential particular, and in that only, that it does not state that the entry so made was with intent to claim title to the boundaries designated in the deed. The answer to this is obvious. A person entering upon a tract of land,

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under a deed, with definite boundaries, is presumed by the mere act of entry so made to intend a claim to the entire tract.

There appears to have been no question whatever made on the intent of those persons to claim the entire tract under the deeds; no proof offered by the plaintiff beyond the introduction of the deed and entry under it, and no point upon the intent to claim to the boundaries designated in the deed was made by the defendant. The introduction of the deed, with proof of entry under it, as already said, raised the presumption of an intent to claim the entire tract. Whence, then, the necessity, if no point of that kind be made by the parties, of submitting the question of intent to the jury in an instruction of this kind? It was entirely unnecessary to charge that the intent to claim to the boundaries of the deed must be shown, if it were not claimed by the defendant that there was no such intent.

We do not think it error for the Court to take from the consideration of the jury in a charge a fact proven by one party, and not controverted by the other. Were the intent, therefore, to claim to the boundaries of the deed necessary, that being proven by the plaintiff and not controverted by the defendant, it was unnecessary to submit it to the jury; but the Court could properly assume it to be an admitted fact.

No error appearing in the record, the judgment must be affirmed. It is so ordered.

WHITMAN, J., did not participate in the foregoing decision.

Ophir Silver Mining Company v. Carpenter.

OPHIR SILVER MINING COMPANY, RESPONDENT, v. C.
CARPENTER, ET ALS., APPELLANTS.

MEASUREMENT OF WATER APPROPRIATION. It seems that the quantity of water appropriated in any given case is to be measured by the capacity of the ditch or flume at the smallest point; that is, at the point where the least water can be carried through it.

APPEAL—INSUFFICIENCY OF EVIDENCE. Where a finding for plaintiff, as to the quantity of a water appropriation, was founded upon the basis that the flume was of a certain size, and also of a certain grade; and it appeared on appeal that, though the size of the flume was proved, there was no sufficient proof of its grade: *Held*, on proper objection, that the judgment should be set aside.

NEW ISSUES NOT TO BE RAISED IN THE SUPREME COURT. Where on the trial of a water case it was conceded that the findings as to the quantity of water appropriated, were to depend upon the capacity of the flume at a certain point: *Held*, that the investigation in the supreme court, as to the question of quantity, should be confined to the same point of the flume.

APPEAL from the District Court of the First Judicial District, Storey County.

The facts are stated in the opinion of the Court.

Beatty & Denson, for Appellants.

Williams & Bixler, for Respondent.

By the Court, LEWIS, C. J.:

In the years 1858 and 1859, one J. H. Rose appropriated a certain quantity of water from the Carson River, by diverting the same for mining purposes, to be used some four miles below the point of diversion. The water thus diverted was conducted to the locality where it was used by means of a ditch and flumes. In the year 1860, the grantors of the respondent also appropriated water from the river, diverting it at a point below the head of the Rose ditch, and using it as motive power for a quartz mill. In the winter of 1861 this ditch was improved and enlarged; and again it is claimed by appellants that it was very much enlarged in the year 1865—a fact important to be determined in the case, for the reason that in the year 1862 the Rose ditch was also greatly enlarged; hence, although admitted that these appellants as the suc-

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cessors of Rose are first entitled to the full quantity of water appropriated by him in the year 1859, it is also admitted that after the appellants have received that, the respondent is entitled to so much as was appropriated by it, before the appellants can further claim the additional quantity appropriated by them in the year 1862, by the enlargement of the old Rose ditch. Thus, it became necessary in the Court below to ascertain, first, the capacity of the Rose ditch as constructed in the year 1859; and secondly, the capacity of the respondent's ditch, and whether it was enlarged in the year 1865, and if so, to what extent. There is no controversy between counsel as to the law of the case, it being conceded on both sides that the quantity of water appropriated in any given case is to be measured by the capacity of the ditch or flume at its smallest point; that is, at the point where the least water can be carried through it. Nor is it questioned that the respondent is entitled to the quantity of water diverted by its predecessors in the winter of 1861, before the appellants can claim the additional quantity appropriated by them in the winter of 1862, by means of the enlargement of the old ditch. Therefore, the only material points to be determined were, first, the capacity of the Rose ditch at its smallest carrying point; and secondly, the capacity of the ditch built by the predecessors of respondent, in the year 1861-2, as compared with its present ditch.

The Court below found the capacity of the flume, just below the head of the Rose ditch, and which seems to be admitted was the point of smallest capacity, to be four and forty-eight one hundredths cubic feet per second, being the quantity capable of being carried by a flume twenty by eighteen and three-fourths inches, on a grade of one-eighth of an inch to the rod. We have not been able to find testimony in the record, sufficient to sustain this conclusion. The only persons who appear to have testified respecting the dimensions and grade of this flume were Rose, Hunt, Rosenbecker and Chapin. As to the size of the flume in question, the finding that it was twenty by eighteen and three-fourths inches is, perhaps, sustained by the testimony; but there appears to be no evidence directly sustaining the finding that its grade was only one-eighth of an inch to the rod. Rose himself swears that the ditch had a grade of

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three feet to the mile, but that the flumes were on a grade of a half inch to twelve feet. To destroy the force of this evidence, it is claimed by counsel for respondent that the witness admitted in another portion of his testimony, that at one point he built a piece of flume twenty-four feet in length on the same grade as the ditch, which would make it less than one-eighth of an inch to the rod, as found by the Court. The testimony relied on is thus given in the transcript: After stating that this flume was put there to carry the water of the ditch under Dana Creek: to the question, "What was the grade of that short flume?" he replied: "I told you I had graded it myself. When the water came through, I put this in the bank, two lengths of it in that place. When the water came there I commenced the two joints of flume. Question. You could not connect it with the grade of the ditch, and let the water under it? Answer. Not at that point. Question. The surveyor made the grade when he surveyed the ditch? Answer. Yes. This was put in there in case the water should come down the ravine. Q. Did the surveyor, when he made that survey, indicate that as a piece of flume? A. I do not think he did. Q. The regular survey was made as though that was a ditch part, and you put in a piece of flume? A. Yes. The Chinamen had dug around the point before. Q. The grade of that must have been changed? A. When I came to dig it there I went and cut a little across and managed it so that I got the water high enough, so that I could start it into the ditch." This is the testimony relied on by counsel as an admission that this twenty-four foot flume was on a grade of only three feet to the mile. We can draw no such conclusion from it. The whole is rather indefinite; but if any thing can be drawn from it, it is that the flume was not on the grade surveyed for the ditch, for the witness speaks of changing that grade. However that may be, even if it were admitted that it was on a grade of only three feet to the mile, it proves nothing in favor of the respondent; for the reason that the only evidence touching the dimensions of this piece of flume shows it to have been twenty-two by twenty-three inches, which is much larger than the flume above upon which the finding of the Court is based. We do not think it is possible to interpret the testimony quoted as showing with any degree of satis-

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faction what the grade of this short flume was. Furthermore, it appears to have been conceded by the parties in the Court below, that the capacity of the long flume, near the head of the ditch, was to determine the quantity of water appropriated; and upon its capacity the Court below based its findings. Hence, it is but fair that the investigation in this Court should be confined to the same section of the flume. The only distinct and satisfactory testimony by Rose then, as to the grade of the flumes, shows them to have been one half an inch to twelve feet.

Hunt testified that his survey showed the general grade of the old Rose ditch to be about two and seven-tenths feet to the mile. The general grade of the ditch may very well have been as stated by Hunt, and still the grade of the various flumes have been more than that. It is not claimed that he testified to the grade of the flume in question, or any flume specially; and it is perfectly manifest the grade of the flumes was greater than that of the ditch. So Hunt's testimony need not and does not necessarily conflict with the other evidence showing the flumes to have been upon a grade of one half inch to the twelve feet, or more. Chapin's testimony goes only to the dimensions of the long flume, a fact which we accept as found by the Court below. The witness Rosenbecker swears positively that the grade of the flumes in the Rose ditch was three-eighths of an inch to the rod; and he also swears that there was no flume in the ditch of less grade. The witness testifies that he measured the flume in question and took its grade. Hence, his testimony was based upon no conjecture or speculation, but upon actual measurement. This evidence, together with that of Rose, is not—as we interpret it—directly contradicted by any witness or any calculation presented in the record. And as their testimony makes the capacity of the Rose ditch much larger than the Court found it to be, we are compelled to set aside that finding, and award a new trial.

Our conclusion upon this point renders it unnecessary to make any inquiry as to the relative capacity of the respondent's ditch of 1862, and that now used by it.

New trial ordered.

WHITMAN, J., did not participate in the foregoing decision.

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ACCESSORY.

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2. **DOCTRINE OF AGENCY AS TO ACCESSORIES BEFORE THE FACT.** An accessory before the fact aiding, abetting or counselling a crime is, under our laws, to be treated as a principal; in the same manner as in the civil law what a principal does by an agent he is to be regarded as doing by himself. *State v. Chapman*, 320.

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2. **ISSUES ON APPEAL FROM NEW TRIAL ORDER.** The purpose of the legislative provisions in relation to appeals from orders on motions for new trials, is to allow all points which could be urged in the court below, either for or against the motion for new trial, to be raised on the appeal from the order granting or refusing it, without any further statement. *White v. White*, 20.
3. **NO REVERSAL FOR ERROR WHICH DOES NOT PREJUDICE.** A judgment will not be reversed on account of error in admitting immaterial or incompetent testimony when it appears that the appellant could not have been prejudiced thereby. *Cahill v. Hirschman*, 57.
4. **IRREGULARITIES OF PRACTICE NOT OBJECTED TO.** Though the proceedings of a district court are plainly irregular in point of practice, yet if no objection be made on that ground, such irregularity will not be considered in the supreme court. *Fitzpatrick v. Fitzpatrick*, 63.
5. **WHAT CONSIDERED ON APPEAL FROM JUDGMENT.** On appeal from a judgment, any error appearing in the judgment roll may be corrected in the appellate court without a statement on appeal. *Klein v. Allenback*, 159.
6. **APPEAL—TRANSCRIPT CONTAINING NOTHING TO BE REVIEWED.** Where, on appeal from a judgment and order overruling a motion for a new trial, the transcript contained neither judgment, order, settled or agreed statement, nor bill of exceptions: *Held*, that there was nothing before the appellate court which could be reviewed. *State v. Eberhart Company*, 186.
7. **PRACTICE.—DISMISSAL OF APPEAL.** Where there is a failure to bring up in the record anything to be reviewed, the appeal will be dismissed. *State v. Eberhart Company*, 186.
8. **APPEAL IN CASE OF CONFLICT OF EVIDENCE.** The rule that a judgment will not be disturbed as being against evidence, where there is a conflict of evidence, has been often enough announced to be considered settled. *Clark v. Nevada Land and M. Co.*, 203.
9. **ANY SUBSTANTIAL EVIDENCE WILL SUPPORT A JUDGMENT.** A judgment will be sustained as against an objection that it is contrary to evidence, if there be any substantial testimony for it to rest upon. *Lewis v. Wilcox*, 215.
10. **JUDGMENT CORRECT THOUGH REASON WRONG.** If a judgment be right, though decided upon a wrong ground, it will not be disturbed by the supreme court. *Conley v. Chedie*, 222.
11. **PRACTICE ACT, SEC. 332—STATEMENT ON APPEAL FROM ORDER.** The word "order," in section three hundred and thirty-two of the Practice Act, providing for a statement on appeal from a judgment or order, does not refer to the ordinary order upon a motion for new trial. *Johnson v. Wells, Fargo & Co.*, 224.
12. **STATEMENT ON APPEAL FROM NEW TRIAL ORDER.** On appeal from an order granting or refusing a new trial, any matter properly pertaining to such order, ex-

- cept it may have arisen subsequent to the notice for the motion, may be considered without any other statement than that used on the motion for new trial. *Johnson v. Wells, Fargo & Co.*, 224.
13. ORDER REQUIRING BOND OR APPOINTING RECEIVER NOT APPEALABLE. The statute (Practice Act, Sec. 380) does not allow an appeal from an order requiring a party to give a bond, nor from an order appointing a receiver. *Meadow Valley M. Co. v. Dodds*, 261.
 14. RELIEF ON APPEAL FROM ORDER APPEALABLE ONLY IN PART. Where an order granting an injunction embraced a further order, entirely independent of the injunction, to the effect that one party should execute a bond for the protection or security of the other: *Held*, on appeal therefrom, that the entertainment by the appellate court of the portion of the order which was appealable would not warrant a review of the other portion which was not appealable. *Meadow Valley M. Co. v. Dodds*, 261.
 15. ASSIGNMENT OR SPECIFICATIONS OF ERRORS ON APPEAL. Where on appeal from an order, appellant brought up a statement of the evidence heard and proceedings had, claiming that it exhibited various errors of the court, and showed that plaintiff failed to make out a case, but without pointing out the particular errors or failure: *Held*, that as there was no assignment or specification of such alleged errors, they could not be reviewed by the appellate court. *Meadow Valley M. Co. v. Dodds*, 261.
 16. NO REVERSAL FOR ERROR WHICH DOES NOT PREJUDICE. No error is noticeable or deemed material which did not or could not prejudice the rights of the party complaining. *Caples v. Central Pacific R. R. Co.*, 265.
 17. APPEAL—POINTS NOT COVERED BY TRANSCRIPT NOT CONSIDERED. Alleged error in refusing to grant a continuance cannot be considered by the supreme court, if the affidavits are not properly in the transcript, and there is no bill of exceptions, nor statement. *State v. Wallin*, 280.
 18. SHOWING OF IMMATERIALITY OF ERROR IN CRIMINAL CASES MUST BE CONCLUSIVE. On an appeal, where error is shown to have been committed, the burden of establishing its immateriality is on the respondent; and in criminal cases the showing of immateriality must be conclusive. *State v. Van Winkle*, 340.
 19. APPEAL—INSUFFICIENCY OF EVIDENCE. Where a finding for plaintiff, as to the quantity of a water appropriation, was founded upon the basis that the flume was of a certain size, and also of a certain grade; and it appeared on appeal that, though the size of the flume was proved, there was no sufficient proof of its grade: *Held*, on proper objection, that the judgment should be set aside. *Ophir Silver M. Co. v. Carpenter*, 393.
 20. NEW ISSUES NOT TO BE RAISED IN THE SUPREME COURT. Where on the trial of a water case it was conceded that the findings as to the quantity of water appropriated were to depend upon the capacity of the flume at a certain point:

Held, that the investigation in the supreme court, as to the question of quantity, should be confined to the same point of the flume. *Ophir Silver M. Co. v. Carpenter*, 393.

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ASSESSOR.

1. DEPUTY COUNTY ASSESSOR'S TERM—LIABILITY OF SURETIES. Where a county assessor on April 5th, 1867, made a writing appointing a deputy, which with the oath of office was recorded as required by statute (Stats. 1864, 134) and the deputy gave a bond for the faithful performance of the duties of his office as such deputy during his continuance therein; and on May 9th, 1868, the assessor made a new writing of appointment of the same person, which with a new oath attached was recorded, but no new bond given: *Held*, that the second writing did not create a new term of office, and that the sureties on the bond were responsible for a defalcation of the deputy occurring at any time during the continuance of his office, though after the date of the second writing. *Krutscheidt v. Hauck*, 163.

2. **POWER OF COUNTY ASSESSOR TO APPOINT DEPUTIES.** The power of the county assessor to appoint deputies (Stats. 1864, 143; 1864-5, 345) is limited only by the statutory provision (Stats. 1864-5, 346) that before such appointment he shall "divide the county into convenient districts, of which division notice shall be given to the board of county commissioners." *Kruttachnitt v. Hawk*, 163.

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ATTACHMENT.

1. **SPECIAL PROPERTY OF OFFICER IN PROPERTY ATTACHED.** An officer who has seized goods upon attachment has a special property in them, coupled with the right of possession; and any interference therewith gives him a right of action against the wrong-doer. *Foulks v. Pegg*, 136.
2. **RIGHTS OF ATTACHMENT CREDITOR AS TO PROPERTY ATTACHED.** An attachment creditor has no interest or property in or possession of the attached goods by reason of the levy, and cannot maintain an action in his own name for interference therewith against a wrong-doer, his only remedy being against the officer. *Foulks v. Pegg*, 136.

SEIZURE BY SHERIFF OF GOODS ATTACHED BY CONSTABLE—see **SHERIFF**, 4.

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BANKRUPTCY.

1. **BANKRUPT PLEADING DISCHARGE PRESUMED TO INSIST ON DISCHARGE.** Where in a suit against joint debtors one pleaded his discharge in bankruptcy subsequent to the commencement of the suit; and plaintiff thereupon amended his complaint, set up such discharge, dismissed as to the bankrupt, and on default of the other defendant took judgment against him; and it was objected on appeal that plaintiff had no right to assume that the bankrupt would insist on his discharge: *Held*, that plaintiff had the right to so assume and to waive proof of the fact of discharge by his amendment, and that it was no error under the circumstances to take a separate instead of a joint judgment. *Dorn v. O'Neale*, 155.

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BONDS.

1. TERM OF LIABILITY ON BOND OF DEPUTY ASSESSOR. Where the sureties on the official bond of a deputy assessor obligated themselves for the faithful performance by the officer of the duties of said office "during his continuance therein": *Held*, that the obligation of the sureties was general, for a term solely dependent upon the will of the assessor, and which would continue, unless revoked, during his entire term. *Krutschmitt v. Hauck*, 163.
2. OFFICIAL BOND FOR SUM GREATER THAN REQUIRED. Where a State treasurer voluntarily gave an official bond in the sum of \$102,500, while the law only required one in the sum of \$100,000: *Held*, that there was nothing in the law to prohibit the giving and the accepting (if voluntarily offered) of such a bond; and that under the circumstances the excess did not invalidate it. *State v. Rhoades*, 352.

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1. STOCK-BROKERAGE—WAIVER OF DELIVERY OR TENDER. Where a broker buys stock for his principal, and the principal before receiving it orders the broker to sell it again on the principal's account, this amounts to a waiver of any delivery or tender of the stock by the broker to the principal. *Cahill v. Hirschman*, 57.

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CERTIORARI.

1. QUESTION INVOLVED ON CERTIORARI. Where, on application of a person to equalize as to his own property the subsequent assessment roll, as provided in the supplemental revenue act of 1867, (Stats. 1867, 111) the county commissioners ordered the entire subsequent assessment roll to be stricken out; and

their proceedings were carried by *certiorari* to the supreme court: *Held*, that the question before the supreme court was solely as to whether the commissioners had the authority to make the order striking out the entire roll, and that it could not consider the question as to the authority to equalize or discharge the assessment of the particular person making the application. *State ex rel. Swift v. Ormsby County Commissioners*, 95.

2. JURISDICTION THE QUESTION ON CERTIORARI. The only question which can be inquired into on *certiorari* is whether the inferior board or tribunal had jurisdiction to do the act sought to be reviewed. *State ex rel. Fall v. Humboldt County Commissioners*, 100.
3. RANGE OF INQUIRY ON CERTIORARI. Where county commissioners were required on receiving a petition of certain voters to do a certain act, and upon receiving a petition and satisfying themselves by evidence that it was from such voters, they did the act: *Held*, on *certiorari*, that they had acquired jurisdiction, and that whether their action was founded upon strictly legal or sufficient evidence, was not within the province of the inquiry. *State ex rel. Fall v. Humboldt County Commissioners*, 100.

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CHARGE.

1. MODIFICATION OF INSTRUCTIONS. In a suit on two policies of insurance, an instruction was asked to the effect that if the jury found that insured, in giving an account of his loss as required by a condition indorsed on the second policy, was guilty of fraud (which fraud was to forfeit all benefit under both policies) they should find for defendant; and the court modified the instruction by striking out "you must find for defendant," and substituting "the policy can for that reason be vitiated": *Held*, that the modification was error, as it destroyed the force of a correct instruction, rendered vague what before was clear, and confined the effect of a violation of the condition to one policy alone. *Gerhauser v. North British & M. Ins. Co.*, 15.
2. JURIES NOT MISLED BY UNOBJECTIONABLE INSTRUCTIONS. It cannot be claimed that a jury in a criminal case has been misled by a charge of the court, in which no specific error is suggested or appears. *State v. McGinnis*, 109.

8. **INSTRUCTIONS—EVIDENT MEANING VERSUS LITERAL LANGUAGE.** Where in an instruction a court used the phrase, "the existence of such theory must be established by the plaintiff conclusively": *Held*, that although taken literally the language was nonsense, the court evidently intended to say, and it should be assumed the jury so understood it, that the correctness of the theory must be so established. *Silver Mining Company v. Fall*, 116.
4. **CHARGING JURY IN RESPECT TO FACTS.** The assumption by a judge in his charge in a criminal case, that any material fact upon which there is any conflict of evidence is proved, is error. *State v. Duffy*, 138.
5. **USE OF EXPRESSION "GUILT OF DEFENDANT" IN CRIMINAL CHARGE.** Where in a criminal case, the court in charging the jury said, "the guilt of the defendant rests upon circumstantial evidence": *Held*, that although evidently what was intended to be said was that the charge of guilt rested on circumstantial evidence, yet the words expressed a totally different meaning and constituted fatal error. *State v. Duffy*, 138.
6. **INSTRUCTION INAPPLICABLE TO ISSUE.** A judgment will not be reversed on account of an erroneous instruction, when it appears that it was not applicable to the issues and could not have injured. *Brown v. Lillie*, 244.
7. **WHOLE CHARGE TO JURY TO BE CONSIDERED AS ENTIRETY.** In determining whether an instruction or portion of a charge is erroneous or calculated to mislead the jury, the whole charge must be taken together and considered as an entirety; and if anything essential, omitted from the instruction or portion of charge, be found in another instruction or portion of charge, the omission will not be fatal. *Caples v. Central Pacific R. R. Co.*, 265.
8. **INSTRUCTION TO JURY NOT TO FIND HIGHER GRADE OF CRIME.** On a murder trial, the judge instructed the jury that under the law and evidence it would not be justified in finding a verdict for any higher grade of offense than manslaughter: *Held*, on appeal by defendant, not necessarily a charge that the State had made out a case of manslaughter. *State v. Little*, 281.
9. **FACTS PROVED AND NOT CONTROVERTED NEED NOT GO TO THE JURY.** It is no error for a court in its charge to take from the consideration of the jury a fact proven by one party and not controverted by the other. *Sharon v. Minnock*, 377.

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CONSTITUTION.

1. CONSTITUTIONAL CONSTRUCTION — DEBT OF CHURCHILL TO HUMBOLDT COUNTY. The second section of the amendatory Act of 1869, concerning counties, providing for the payment of \$3,000 a year for five years by Churchill County to Humboldt County, (Stats. 1869, 88) does not conflict with Art. IV, Sec. 17, of the constitution, which prohibits a statute from embracing more than one subject and matters properly connected therewith, which shall be expressed in the title thereof. *Humboldt County v. Churchill County Commissioners*, 20.
2. NINTH JUDICIAL DISTRICT CONSTITUTIONAL. The Act of March 12th, 1867, constituting Lincoln County the Ninth Judicial District (Stats. 1867, 129) is

not in conflict with the constitutional clause (Art. VI, Sec. 5) which forbids the change or alteration of the boundaries of a judicial district during the incumbent judge's term of office. *Leake v. Bladel*, 40.

3. **CONSTITUTIONAL LAW—JUDGES NOT TO CHARGE AS TO FACTS.** The provisions of the Constitution, (Art. VI, Sec. 12) that "Judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law," whether it be wise and wholesome or not, must be fully enforced both in letter and spirit. *State v. Duffy*, 138.
4. **MEANING OF "INDICTMENT OF A GRAND JURY" IN CONSTITUTION.** Where an indictment, which omitted the essential allegation of venue, was amended in that respect: *Held*, that it was no longer an "indictment of a grand jury," within the meaning of Art. I, Sec. 8, of the constitution. *State v. Chamberlain*, 257.

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1. **STATUTORY CONSTRUCTION—IMPAIRING CONTRACTS.** The statute of 1869, providing for the payment of \$3,000 a year for five years by Churchill County to Humboldt County, (Stats. 1869, 88) does not interfere with warrants drawn upon the treasury of Churchill County and registered at the date of its passage, and is not for any such reason open to the objection of impairing the obligation of contracts. *Humboldt County v. Churchill County Commissioners*, 30.
2. **EXPRESSIO UNIUS EXCLUSIO ALTERIUS.** The Act of February 27th, 1866, designating the judicial districts of the State, distinctly provided that the fifth district should consist of Humboldt County, and omitted all mention of Lincoln County, which had previously been attached to the fifth district: *Held*, that such a designation was equivalent to an express declaration that no other county than Humboldt was included in the fifth district. *Leake v. Bladel*, 40.
3. **SUBSTANTIAL COMPLIANCE WITH CONDITION PRESCRIBED BY STATUTE.** Where a statute prescribed that if a railroad should be built through a certain point in a certain county, such county should issue its bonds to the company; *Held*, that though a substantial compliance with the condition would have been sufficient, it was not a substantial compliance for the road not to pass the point prescribed, though it might pass a point more advantageous for the county and though a branch were run to the point prescribed. *Virginia and Truckee R. R. Co. v. Lyon County Commissioners*, 68.

4. **PRINCIPLE OF STATUTORY CONSTRUCTION.** In construing a statute the duty of a court is to seek the legislative intent and reach the object sought to be expressed; but in so doing the first step is, if possible, to ascertain the intent from the language used, and if that is clear and unambiguous, inquiry stops. *Virginia and Truckee R. R. Co. v. Lyon County Commissioners*, 68.
 5. **STATUTORY CONSTRUCTION—PLAIN LANGUAGE.** Where the language of a statute is plain, its intention must be deduced from such language, and courts have no right to go beyond it. *State ex rel. Hess v. Washoe County Commissioners*, 104.
 6. **MEANING OF "LOCATION" IN WHITE PINE MINING LAWS.** The word "location," as used in the mining laws of the White Pine District means the aggregate of ground claimed as a mine, and not the interest of a single shareholder. *Leet v. John Dare S. M. Co.*, 218.
 7. **STATUTORY CONSTRUCTION—POPULAR AS OPPOSED TO TECHNICAL MEANING OF WORDS.** The rule that technical words used in a statute are to be taken in their technical sense, is subject to the qualification that it is only when used with reference to the particular subject as to which they have a special meaning, that they are to receive such meaning; but that if used generally, their popular meaning is the one intended. *Ormsby County v. State of Nevada*, 265.
- DESCRIPTIONS TO BE UNDERSTOOD AS USED AT TIME OF CONTRACT—see CONTRACTS, 7, 8.**
- CONSTRUCTION OF MARRIAGE STATUTE—see STATUTES, 5.**

CONTINUANCE.

1. **CONTINUANCE WITHIN DISCRETION OF COURT.** A continuance in a criminal case is within the discretion of the court, and unless there is an abuse of its discretion, its action will be sustained. *State v. Chapman*, 320.
 2. **DILIGENCE TO PROCURE CONTINUANCE.** Affidavits for continuance in a criminal case on account of the absence of witnesses for defense should show diligence in attempting to procure their attendance, that at least reasonable means had been taken to ascertain their whereabouts, and that there was some reasonable probability that their attendance could be procured within a proper time. *State v. Chapman*, 320.
- ALLEGED ERROR AS TO CONTINUANCE NOT CONSIDERED ON APPEAL UNLESS PROPERLY TAKEN UP—see APPEAL, 17.**
- WAIVER OF OBJECTIONS TO AFFIDAVITS FOR CONTINUANCE—see WAIVER, 5.**

CONTRACTS.

1. **ACCEPTANCE OF TREASURY NOTES ON GOLD COIN CONTRACTS.** If a creditor accepts treasury notes at par, in payment of a contract calling for coin, it is a com-

plete satisfaction of the debt; and no action can, after the acceptance of such money, be maintained to recover the difference in value between it and coin. *Gilman v. Douglas County*, 27.

2. "SPECIFIC CONTRACT LAWS." Where a contract is made payable "in gold coin or its equivalent in United States legal tender notes," it does not require a specific contract act (so called) to empower a court to enforce it according to its terms. *Wells, Fargo & Co. v. Van Sickle*, 45.
3. CONTRACTS—MEETING OF MINDS. There can be no valid executory contract unless there be a meeting of the minds of the respective parties upon its terms and conditions; they must assent to the same thing in the same sense. *Hillger v. Overman Silver Mining Co.*, 51.
4. CONTRACT BETWEEN COUNTY AND RAILROAD MADE BY LEGISLATURE. Where the legislature provided that if a railroad should pass a certain point in a certain county, the county should issue its bonds to the railroad company; *Held*, that the statute framed a contract between the county and the company, and that the county could not be obliged to issue its bonds if the road did not pass the point prescribed. *Virginia and Truckee R. R. Co. v. Lyon County Commissioners*, 68.
5. STRICT PERFORMANCE OF CONDITIONS PRECEDENT. A condition precedent must be strictly performed in every particular, in order to entitle the party, whose duty it is to perform it, to enforce the contract against the other party. *Virginia and Truckee R. R. Co. v. Lyon County Commissioners*, 68.
6. JUDICIAL POWER OVER CONTRACTS. A court has the power to interpret a contract as between parties before it, but not to make a new one for them. *Virginia and Truckee R. R. Co. v. Lyon County Commissioners*, 68.
7. MORTGAGE ON POCOTILLO MINE—DESCRIPTION EXPLAINED IN CONTRACT. Where a controversy arose between Brandow and the Pocotillo Silver Mining Company as to the ownership of eight hundred feet of mining ground, and on an amicable settlement a contract was entered into between them, in which, after reciting the controversy as to the said mining ground "known as the Pocotillo mine," Brandow agreed to convey to the company all his right, title and interest in "said claim or mine," and the company agreed, among other things, to pay Brandow fifteen thousand dollars, and that the contract should "operate as a lien by way of mortgage upon said mine" to secure the same: *Held*, that the mortgage was only to be upon the mining ground in controversy and not upon the Pocotillo mine in fact, which embraced much more ground. *Brandow v. Pocotillo S. M. Co.*, 169.
8. DESCRIPTIONS TO BE UNDERSTOOD AS USED AT TIME OF CONTRACT. Where the words "Pocotillo mine" were used in a contract to designate certain mining ground therein specifically described: *Held*, that it could not be claimed that a larger tract of ground, afterwards known as the Pocotillo mine, was intended. *Brandow v. Pocotillo S. M. Co.*, 169.

CONTRACTS OF CORPORATIONS—UNAUTHORIZED STATEMENTS OF OFFICERS—see CORPORATIONS, 1.

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CONTRACT IN GOLD COIN OR ITS EQUIVALENT—see CURRENCY, 2, 3.

ESTOPPEL BY ACCEPTANCE OF PERFORMANCE OF CONTRACT—see ESTOPPEL, 1.

EVIDENCE OF CONTRACT—DIRECT PROOF AS OPPOSED TO PRESUMPTION—see EVIDENCE, 1.

INSURANCE CONTRACT—FRAUD—see FRAUD, 1.

HAMILTON CITY PAROL CONTRACTS—see HAMILTON CITY, 1.

CONDITIONS INDORSED ON POLICY AS PART OF INSURANCE CONTRACT—see INSURANCE, 1.

CONTROLLER,

1. APPROPRIATION TO PROSECUTE INFRACTION OF REVENUE LAWS—CONTROLLER'S DUTIES. The money appropriated by the legislature in 1869, "for prosecuting delinquents for infraction of revenue laws, to be expended under the direction of the controller," (Stats. 1869, 188) is in the nature of a contingent fund for the better and more complete carrying out of the duties of the controller's office touching the revenues of the State; it is under his control not simply for him to draw his legal warrants upon, but for him to direct its expenditure. *Swift v. Doron*, 125.

CORPORATIONS.

1. CONTRACTS OF CORPORATIONS—UNAUTHORIZED STATEMENTS OF OFFICERS. Officers of a corporation, who cannot bind the company in a contract by directly executing it on its behalf, cannot impose any such liability upon it by stating or persuading a person that the company itself had done so, when in fact it had not. *Hillyer v. Overman Silver Mining Co.*, 51.
2. CORPORATION TRUSTEES CAN ONLY ACT AS A BOARD. The trustees of a corporation can only bind it when they are together as a board, acting as such. *Hillyer v. Overman Silver Mining Co.*, 51.
3. CARE REQUIRED OF MUNICIPAL CORPORATIONS IN MAKING IMPROVEMENTS. Though it is not incumbent upon the City of Virginia, under its charter, to open streets or keep the sidewalks in repair, yet if it undertake to do so, the act must be done with the same degree of care for the rights and personal safety of individuals, which natural persons are required to exercise under similar circumstances. *McDonough v. Mayor and Aldermen of Virginia City*, 90.

4. **PAROL AND IMPLIED CONTRACTS BY MUNICIPAL CORPORATIONS.** A municipal corporation, in the absence of statute to the contrary, may, like any other corporation, render itself liable on parol or implied contracts. *Fitton v. Inhabitants of Hamilton City*, 196.

5. **DEED OF CORPORATION—PRESUMPTION OF AUTHORITY TO AFFIX SEAL.** Where the seal on a deed purporting to be that of a corporation was proved, or in other words, the deed was admitted in evidence without objection for want of proof of such seal: *Held*, that the presumption followed that it had been affixed by competent authority; and that the burden of proof to show want of authority was upon him alleging such want. *Sharon v. Minnock*, 377.

EVIDENCE OF SALES OF STOCK FOR ASSESSMENTS—see EVIDENCE, 2.

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FORGERY—PROOF OF EXISTENCE OF CORPORATION INJURED—see EVIDENCE, 11.

PLEADING—CHARACTER OF CORPORATIONS DEFENDANT—see PLEADING, 3.

SERVICE OF SUMMONS ON CALIFORNIA CORPORATION—see SUMMONS, 1, 2.

COSTS.

1. **COSTS WHERE RECOVERY LESS THAN THREE HUNDRED DOLLARS.** The provisions of section 478 of the Practice Act, that no costs shall be allowed when less than three hundred dollars is recovered, is obviously confined to cases in the district courts, and was evidently adopted to prevent the bringing of actions in those courts which should or might be instituted in justices' courts. *Klein v. Allenbach*, 159.
2. **COSTS ON MOTIONS.** It is within the power of a court to permit the costs of motions made during the progress of the trial, such as to quash the service of summons, &c., to abide the event of the suit; there being no statute or rule of practice requiring the costs of such motions to be taxed against the losing party. *Coples v. Central Pacific R. R. Co.*, 265.
3. **NO DOCKET FEE IN ACTION BY STATE.** The statute requiring the payment of a docket fee on the commencement of every action or proceeding in a district court, (Stats. 1864-5, 406) does not apply to actions commenced by the State. *State v. Rhoades*, 352.

JURISDICTION OF DISTRICT COURTS—COSTS—see JURISDICTION, 1.

NOTICE OF MOTION TO RETAX COSTS—see RULES OF COURT, 2.

COUNTIES.

1. **CREATION OF LINCOLN COUNTY.** Lincoln County was unconditionally created by the act of 1866, (Stats. 1866, 131) and as completely segregated from Nye County by the operation of that act as it could be by legislative action. *Leake v. Blasdel*, 40.

2. **NEW COUNTY WITHOUT SEPARATE GOVERNMENT.** There may be a county without a government of its own; as happens when a new county, created out of another, continues to be attached to and controlled by the government of such other until its own government may be organized. *Leake v. Blasdel*, 40.

CONTRACT BETWEEN COUNTY AND RAILROAD MADE BY LEGISLATURE—see **CONTRACT**, 4.

COUNTY RIGHT TO ROADS WHERE TOLL FRANCHISE FORFEITED—see **ROADS**, 2.

COUNTY COMMISSIONERS.

1. **DUTIES OF COUNTY COMMISSIONERS—DISCRETION.** Under the act providing for the payment of \$3,000 a year for five years by Churchill to Humboldt County, (Stats. 1869, 88) the county commissioners of Churchill County had no discretion respecting the appropriation of the money. *Humboldt County v. Churchill County Commissioners*, 80.
2. **POWERS OF COUNTY COMMISSIONERS LIMITED AND SPECIAL.** If the authority of the board of county commissioners, acting under limited and special powers, to do a particular thing is questioned, their record must exhibit affirmatively all the facts necessary to give them authority to do such thing, otherwise the presumption is against their jurisdiction. *State ex rel. Swift v. Ormsby County Commissioners*, 95.
3. **POWERS OF COUNTY COMMISSIONERS SPECIAL AND LIMITED.** Boards of county commissioners are of special and limited powers, and must always exercise their powers as prescribed, where such prescription is material. *State ex rel. Hess v. Washoe County Commissioners*, 104.

RANGE OF INQUIRY ON CERTIORARI FROM COUNTY COMMISSIONERS—see **CERTIORARI**, 3.

MANDAMUS AGAINST COUNTY COMMISSIONERS TO DO PRESCRIBED DUTY—see **MANDAMUS**, 3.

POWERS OF COUNTY COMMISSIONERS AS TO TOLL ROADS—see **ROADS**, 2.

POWERS OF COUNTY COMMISSIONERS AS TO TAX ASSESSMENTS—see **TAXES**, 1, 2.

COUNTY FUNDS.

1. **EFFECT OF AUDITING AND ALLOWING A CLAIM AGAINST A COUNTY.** The auditing and allowing of a claim against a county gives the holder thereof no lien upon or right to any money in the treasury, or which may come into it; it is only the order or warrant of the auditor which gives that right. *Humboldt County v. Churchill County Commissioners*, 80.

2. **SPECIFIC APPROPRIATION OF COUNTY REVENUES.** The payment of all ordinary claims against a county is subject to any specific appropriation and setting apart of the county revenues for any designated purpose, unless such appropriation interfere with some prior vested right to the revenue. *Humboldt County v. Churchill County Commissioners*, 80.

LEGISLATIVE POWER AS TO PREFERRING CLAIMS AGAINST COUNTIES—see LEGISLATURE, 1.

RIGHTS OF COUNTY OFFICERS TO COUNTY REVENUES FOR SALARIES—see OFFICERS, 1.

COUNTY SEAT.

1. **HUMBOLDT COUNTY SEAT OF JUSTICE—EVIDENCE.** A petition having been presented to the county commissioners of Humboldt County to remove the seat of justice as provided by law, (Stats. 1867, 78) and the commissioners having determined, from examinations and affidavits, that petitioners were legal voters, and having thereupon ordered an election: *Held*, on *certiorari*, that the evidence by affidavit was all that was necessary to give the commissioners jurisdiction to make the order; and that, as the question on *certiorari* was confined to jurisdiction, no further inquiry could be made. *State ex rel. Fall v. Humboldt County Commissioners*, 100.
2. **TIME OF ELECTION TO REMOVE COUNTY SEAT.** Under the act of 1867, for the removal of county seats, which provided that when a number of voters of a county equal to three-fifths of the number of voters at the last general election should petition for a removal, "the county commissioners shall within fifty days thereafter cause an election to be held," (Stats. of 1867, 78): *Held*, that the election must be held within *fifty* days after the establishment of the fact of a petition by the proper number of voters; and that where commissioners fixed the period at *seventy* days, their action was void. *State ex rel. Hess v. Washoe County Commissioners*, 104.

COURTS AND JUDGES.

NINTH JUDICIAL DISTRICT CONSTITUTIONAL—see CONSTITUTION, 2.

JUDICIAL POWER AS TO CONTRACTS—see CONTRACTS, 6.

POWER OF COURT AS TO COSTS ON MOTIONS—see COSTS, 2.

TIME OF ELECTION OF DISTRICT JUDGES—see ELECTIONS, 1.

JURISDICTION OF DISTRICT COURTS AS TO AMOUNT CLAIMED—see JURISDICTION, 1.

JURISDICTION OF SUPREME COURT—see JURISDICTION, 3, 7.

JURISDICTION OF FEDERAL JUDICIARY—see JURISDICTION, 4.

TERMS OF OFFICE OF DISTRICT JUDGES—see OFFICERS, 2.

INTIMATIONS OF COURT EXCLUDING EVIDENCE—see PRACTICE, 6.

ENFORCEMENT OF RULES OF COURT—see RULES OF COURT, 1, 3.

JUDGES' CERTIFICATE TO STATEMENT ON APPEAL—see STATEMENT, 1, 2.

CRIMINAL LAW.

1. **CRIMINAL LAW—APPEAL—INSUFFICIENCY OF EVIDENCE.** A judgment in a criminal case will not be disturbed by the supreme court on the ground of insufficiency of the evidence, if there be any evidence tending to prove the allegations of the indictment. *State v. McGinnis*, 109.
2. **EVIDENCE OF GOOD CHARACTER IN CRIMINAL CASES.** An instruction in a criminal case to the effect that evidence of good character is proper in all criminal cases, and that in doubtful cases it frequently becomes material, and is sufficient to turn the scale in favor of the accused; and that, should the jury be in doubt as to the facts or guilt of defendant, it might give evidence of previous good character such weight as to acquit: *Held*, to be entirely too broad, and properly refused. *State v. McGinnis*, 109.
3. **"INDEPENDENT AND POSITIVE EVIDENCE" AS TO CRIMINAL INTENT.** An instruction in a criminal case to the effect that the intention of the accused at the time of the act done is the principal fact upon which defendant's guilt as charged depends; and that it is the duty of the State to establish by positive evidence the intention of the accused, so as to leave nothing to be inferred from the other facts of the case with regard to the intention; and that if the State failed to give such independent and positive evidence of intention the jury should acquit: *Held*, erroneous and properly refused. *State v. McGinnis*, 109.
4. **CRIMINAL LAW—ASSAULT WITH DEADLY WEAPON.** To constitute the crime of assault with a deadly weapon with intent to inflict a bodily injury, there must be an unlawful attempt with a weapon, deadly either in its nature or capable of being used in a deadly manner, to inflict a bodily injury, and with the present ability so to do. *State v. Napper*, 113.
5. **ATTEMPTED ASSAULT WITH UNLOADED PISTOL.** Where on a trial for assault with a deadly weapon with intent to inflict a bodily injury, it appeared that defendant, within shooting but not within striking distance, held a capped pistol in his hand, pointed it at the prosecutor, and attempted to discharge it: *Held*, that there could be no conviction without proof that the pistol was loaded. *State v. Napper*, 113.
6. **ASSAULT—ABILITY AND INTENTION.** To warrant a conviction for assault with a deadly weapon with intent to inflict a bodily injury, there must be a showing of both ability and intention to commit the offense. *State v. Napper*, 113.

7. **CRIMINAL LAW—CHARGE—ASSUMPTION OF GUILT.** Where in charging the jury in a criminal case, the court used the expression, "the guilt of the defendant rests upon what is known as circumstantial evidence": *Held*, that there was a direct assumption of the guilt of defendant, and therefore manifest error. *State v. Duffy*, 138.
8. **UNDER INDICTMENT FOR GRAND LARCENY, PRINCIPAL OR ACCESSORY CAN BE LEGALLY CONVICTED.** In a prosecution for grand larceny, where there is no evidence tending to prove guilt, either as principal or accessory before the fact, there can be no legal conviction. *State v. Stewart*, 175.
9. **FORGERY OF CHECK PAYABLE TO "SAPPHIRE MILL OR BEARER."** In a prosecution for forging a check drawn in favor of "Sapphire Mill or Bearer": *Held*, that an objection that the check presented no sensible payee was invalid, for the reason that the check being payable to bearer was sufficient. *State v. Cleaveland*, 181.
10. **ERRONEOUS ALLEGATION OF PERSON INJURED.** An instruction in a forgery case, that "when an offense involves the commission, or an attempt to commit private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, shall not be deemed material": *Held*, to be simply a recital of the statutory provisions upon the subject, (Stats. 1861, 460, Sec. 240) and proper under circumstances calling for an instruction upon the point. *State v. Cleaveland*, 181.
11. **CRIMINAL LAW—CHARGE IN DEFENDANT'S FAVOR.** Where a jury in a murder case was charged that it would not be justified under the law and evidence, in finding a verdict for any higher grade of offense than manslaughter: *Held*, that though the instruction (which was authorized by section three hundred and seventy-six of the Criminal Practice Act) might be repugnant to the constitutional clause against charging as to matters of fact, yet it was not to defendant's prejudice, and he could not complain. *State v. Little*, 281.
12. **CRIMINAL LAW—EVIDENCE TO CORROBORATE ACCOMPLICE.** Where on appeal in a criminal case it was claimed that certain evidence given for the purpose of corroborating that of an accomplice was not sufficient: *Held*, that the question before the Supreme Court was not as to the weight of the evidence, but as to whether it was corroborative within the meaning of Sec. 365 of the Criminal Practice Act. *State v. Chapman*, 320.
13. **ROBBERY BY ABSENT PERSON.** Where several persons combined to rob Wells, Fargo & Co's stage, in Washoe County; and one named Chapman, in pursuance of the combination, went to San Francisco and telegraphed when a large amount of money would be on the stage, and the others did the robbery: *Held*, that Chapman was an accessory before the fact, and as such properly charged and convicted with the others as having committed the robbery in Washoe County. *State v. Chapman*, 320.

14. VENUE IN TRIAL OF ACCESSORY. There seems to be an incongruity between Sec. 91 of the Criminal Practice Act, which requires an accessory before the fact to be tried where his offense is committed, and Sec. 252, which places him on the same plane with the principal; but the former clearly does not apply in a case where the acts of the accessory are done out of the State. *State v. Chapman*, 320.

15. CHARGING CIRCUMSTANTIAL TO BE SUPERIOR TO DIRECT EVIDENCE, ERROR. Where the court in a criminal case instructed the jury that "circumstantial evidence is more satisfactory than the testimony of a single individual, who swears he has seen a fact committed": *Held*, error. *State v. Van Winkle*, 340.

ACCESSORY BEFORE THE FACT SAME AS PRINCIPAL—see ACCESSORY, 1.

OMISSION OF VENUE IN INDICTMENT NOT AMENDABLE—see AMENDMENT, 1.

SHOWING OF IMMATERIALITY OF ERROR IN CRIMINAL CASES MUST BE CONCLUSIVE—see APPEAL, 18.

A PISTOL NOT ALWAYS A DEADLY WEAPON—see DEADLY WEAPON, 1.

PROOF OF CRIMINAL INTENT—see EVIDENCE, 4.

ALLEGATIONS AND PROOF AS TO PERSON INJURED BY FORGERY—see EVIDENCE, 11, 12.

VENUE MATERIAL IN INDICTMENTS—see INDICTMENT, 2.

STATUTORY FORM OF INDICTMENT DEFECTIVE—see INDICTMENT, 3.

JURISDICTION OF SUPREME COURT TO REVIEW EVIDENCE IN CRIMINAL CASES—see JURISDICTION, 7.

FORGERY OF CHECK ON "AGENCY OF BANK OF CALIFORNIA"—see PROMISSORY NOTES, 2.

CURRENCY.

1. PAYMENT OF GOLD COIN WARRANTS IN TREASURY NOTES. Where the holders of county warrants calling for gold coin accepted treasury notes for them, though protesting against payment in that currency, and surrendered the warrants: *Held*, that they could not afterwards recover the difference in value between the treasury notes and coin. *Gilman v. Douglas County*, 27.

2. SPECIFIC CONTRACT—GOLD COIN OR ITS EQUIVALENT. Where a promissory note was made payable "in gold coin or its equivalent in United States legal tender notes": *Held*, that a judgment on it simply and solely for gold coin was erroneous; that the judgment should have followed the contract, and fixed the amount to be paid, if paid in gold, and the amount to be paid, if paid in legal tender notes. *Wells, Fargo & Co. v. Van Sickle*, 45.

3. **VALUES IN GOLD OR LEGAL TENDER NOTES.** Where parties make a contract payable in gold coin, or its equivalent in legal tender notes, and do not agree upon a place of payment or a standard by which the relative values of the two currencies can be measured, the place and time of trial will be the market where the values should be estimated. *Wells, Fargo & Co. v. Van Sickle*, 45.
4. **CLAIMS FOR DAMAGES NOT DEBTS PAYABLE IN CURRENCY.** A claim for damages is not (any more than a tax) a "debt" within the meaning of the act of congress relating to treasury notes, and the legislature might therefore provide that a judgment therefor should be in gold coin, and not to be satisfied by payment in legal tender currency. *Clark v. Nevada Land and M. Co.*, 208.

ACCEPTANCE OF TREASURY NOTES ON GOLD COIN CONTRACTS—see CONTRACTS, 1.

DAMAGES.

1. **PROSPECTIVE DAMAGES.** Prospective damages in actions, such as for overflowing meadow lands and thereby injuring grasses for time to come, are allowed only upon proof that they are reasonably certain to occur. *Clark v. Nevada Land and M. Co.*, 208.
2. **DAMAGES TO HAY LANDS FOR FUTURE CROPS.** Where in a suit for unlawfully overflowing plaintiff's grass lands, and thereby destroying crops, a judgment was given for damages already sustained, and also damages for loss of crops for the next two cropping seasons: *Held*, that the damage for the loss of future crops was entirely too prospective and conjectural, and that the judgment should be modified by striking it out. *Clark v. Nevada Land and M. Co.*, 208.
3. **BODILY SUFFERING AS SOURCE OF DAMAGE.** Though it is difficult to conceive how bodily pain and suffering can be estimated in dollars and cents, yet it is well settled that a recovery can be had for them as damages, in actions against passenger carriers for personal injuries occasioned by negligence. *Johnson v. Wells, Fargo & Co.*, 224.
4. **PAIN OF MIND AS AN ELEMENT OF DAMAGE.** In an action against a passenger carrier for personal injuries, occasioned by the breaking down of a stage coach, it is error to instruct the jury in estimating damages to take into consideration plaintiff's "pain of mind," as distinct from his bodily suffering. *Johnson v. Wells, Fargo & Co.*, 224.
5. **COMPENSATORY DISTINCT FROM PUNITIVE DAMAGES.** In actions against passenger carriers for personal injuries occasioned by their negligence, the rule of damages is based upon the idea of compensation and not of punishment. *Johnson v. Wells, Fargo & Co.*, 224.
6. **DAMAGES AGAINST PASSENGER CARRIERS FOR NEGLIGENCE STRICTLY COMPENSATORY.** The only damages that can be recovered in an action against a passenger carrier for personal injuries occasioned by negligence are strictly compensatory, including damages for bodily pain, and so much only of mental suffering as may be indivisibly connected therewith. *Johnson v. Wells, Fargo & Co.*, 224.

7. "CHARACTER" OF INJURED PERSON NOT INVOLVED IN SUIT FOR NEGLIGENCE. In an action against a passenger carrier for personal injuries caused by negligence, the character of plaintiff cannot be considered as an element of calculation, in estimating the amount of damages; and an instruction submitting it to the jury for such purpose is error. *Johnson v. Wells, Fargo & Co.*, 224.

CLAIMS FOR DAMAGES NOT DEBTS PAYABLE IN CURRENCY—see CURRENCY, 4.

DAMAGES FOR FORTUITOUS INJURIES TO WATER RIGHTS—see WATER RIGHTS, 2, 4.

DEADLY WEAPON.

1. A PISTOL NOT ALWAYS A DEADLY WEAPON. A pistol may be a deadly weapon under some circumstances without being loaded, but not so unless it can be used in some other deadly manner besides shooting. *State v. Napper*, 118.
2. NO PRESUMPTION OF LOADING OF PISTOL FROM ATTEMPTED USE. The fact that an attempt was made to use a pistol as if it were loaded is not of itself sufficient to warrant an inference that it was loaded. *State v. Napper*, 118.

DECLARATIONS.

1. DECLARATIONS EXPLAINING ACTS OR MOTIVES. Where the proof of acts done by a person is admissible in evidence, any declarations accompanying and tending to explain such acts, or the motives controlling them, are likewise admissible as a part of the acts themselves; and this rule is not confined to such declarations as are against the interest of the party making them. *Rollins v. Stroud*, 150.

DECLARATIONS OF PARTY AS PART OF RES GESTE—see EVIDENCE, 8, 9, 10.

DECLARATIONS OF VENDOR AFTER SALE—see EVIDENCE, 15.

DEED.

DEED OF CORPORATION—PRESUMPTION OF AUTHORITY TO AFFIX SEAL—see CORPORATIONS, 5.

PRESUMPTION OF CLAIM TO ENTIRE TRACT OF LAND BY ENTRY UNDER DEED—see ENTRY, 1.

OBJECTION AS TO RIGHT TO EXECUTE DEED NOT OBJECTION AS TO EXECUTION—see EXCEPTION, 1.

RECORD OF DEED, CONSTRUCTIVE NOTICE OF CONTENTS TO WHOM—see RECORD, 1.

DEFINITIONS.

1. POPULAR MEANING OF "ADVANCES." The word "advances," as employed in the Act of 1869, relating to claims for services or advances to the State, (*State*

1869, 104) is there used rather in its popular than in its strict legal definition, and includes rents of buildings used by the State. *Ormsby County v. State of Nevada*, 265.

"ORDER" IN PRACTICE ACT, SEC. 332, DOES NOT MEAN NEW TRIAL ORDER—see APPEAL, 11.

MEANING OF "INDICTMENT OF A GRAND JURY" IN CONSTITUTION—see CONSTITUTION, 4.

MEANING OF "LOCATION" IN WHITE PINE MINING LAWS—see CONSTRUCTION, 6.

DELIVERY.

STOCK-BROKERAGE—WAIVER OF DELIVERY—see BROKER, 1.

DELIVERY AND CHANGE OF POSSESSION—see SALE 3, 4.

DELIVERY AFTER SALE AND BEFORE ATTACHMENT—see STATUTE OF FRAUDS, 2.

DEMAND.

MANDAMUS—WHEN PREVIOUS DEMAND NECESSARY—see MANDAMUS, 2

DEPUTY.

DEPUTY COUNTY ASSESSOR—TERM OF—LIABILITY FO SURETIES FOR—see ASSESSOR, 1.

POWER OF COUNTY ASSESSOR TO APPOINT DEPUTIES—see ASSESSOR, 2.

DESCRIPTION.

DESCRIPTION EXPLAINED IN CONTRACT—see CONTRACT, 7.

DESCRIPTIONS TO BE UNDERSTOOD AS USED AT TIME OF CONTRACT—see CONTRACT, 8.

DISCRETION.

CONTINUANCE WITHIN DISCRETION OF COURT—see CONTINUANCE, 1.

DUTIES OF COUNTY COMMISSIONERS—DISCRETION—see COUNTY COMMISSIONERS, 1.

DISCRETION IN GRANTING PRELIMINARY INJUNCTION—see INJUNCTION, 1.

MANDAMUS AGAINST AN OFFICER HAVING A DISCRETION—see MANDAMUS, 1.

NEW TRIALS NOT MATTERS OF DISCRETION—see NEW TRIAL, 4.

DISCRETION OF COURTS AS TO THEIR RULES—see RULES OF COURT, 3.

DISCRETION AS TO CHANGE OF PLACE OF TRIAL—see VENUE, 1.

DISMISSAL.

DISMISSAL OF APPEAL WHERE NOTHING BROUGHT UP FOR REVIEW—see APPEAL, 7.

DISMISSAL OF ACTION BY PLAINTIFF NOT TO AFFECT INTERVENORS—see INTERVENTION, 1.

SPECIFICATION OF GROUNDS OF NON-SUIT—see NON-SUIT, 1.

DIVORCE.

1. DIVORCE—WANT OF LEGAL AGE. Where a female of the age of sixteen years entered into a marriage "without force or fraud, and with her full and free consent": *Held*, that there was no ground of divorce on account of want of legal age, though there was no consent by any parent or guardian. *Fitzpatrick v. Fitzpatrick*, 63.

DOCKET FEE.

NO DOCKET FEE IN ACTION BY STATE—see COSTS, 3.

ELECTIONS.

1. TIME OF ELECTION OF DISTRICT JUDGES. The constitution contemplates that the election of district judges throughout the State shall all occur at the same time; and it is competent for the legislature to provide that a judge to be elected at another time shall hold only till the time of such general election of judges, though it may not give him a full term of four years. *State ex rel. Hubbard v. Gorin*, 276.
2. NOTICE OF ELECTION FOR FULL TERM NOT INDISPENSABLE. Where a full term of the office of district judge is to be filled, the failure to give notice of election (such as is required when a vacancy is to be filled) will not vitiate an election. *State ex rel. Hubbard v. Gorin*, 276.

TIME OF ELECTION TO REMOVE COUNTY SEAT—see COUNTY SEAT, 2.

CONFLICT OF STATUTES RELATING TO ELECTIONS—see STATUTES, 7.

EMINENT DOMAIN.

1. RIGHT OF WAY OVER PUBLIC LAND WITHOUT COMPENSATION. Under the act of congress giving the right of way over public land for mining or agricultural ditches or canals, (14 Statutes at Large, 253, Sec. 9) there is no question of taking private property either for public or private use—the land being public land the government has the absolute control over it. *Hobart v. Ford*, 77.

ENTRY.

1. **PRESUMPTION OF CLAIM TO ENTIRE TRACT BY ENTRY UNDER DEED.** A person entering upon a tract of land under a deed with definite boundaries, is presumed by the mere act of entry so made to intend to claim the entire tract. *Sharon v. Minnock*, 377.

EQUALIZATION.

(SEE TAXES.)

EQUITY.

1. **EQUITY JURISDICTION—REMEDY AT LAW.** Equity will not take jurisdiction where there is a full, complete and adequate remedy at law; that is, where the wrong complained of may be fully compensated in damages which can easily be ascertained, and it is not shown that a judgment at law cannot be satisfied by execution. *Conley v. Chadic*, 222.

ERROR.

1. **ERROR WITHOUT PREJUDICE.** If upon admitted or undisputed facts a verdict for plaintiff upon a question of title to property could not legally have been against him, it cannot be said that the admission of illegal evidence upon the same point, or the refusal of the court to instruct the jury to disregard it, could have prejudiced the defendant. *Brown v. Lillie*, 244.
2. **ERROR WITHOUT PREJUDICE.** A judgment will not be reversed on account of an erroneous instruction, if it appear that such instruction was impertinent to the issue, and did no injury to the party complaining. *Sharon v. Minnock*, 377.

NO REVERSAL FOR ERROR WHICH DOES NOT PREJUDICE—see APPEAL, 3, 16.

ASSIGNMENT OF ERRORS ON APPEAL—see APPEAL, 15.

SHOWING OF IMMATERIALITY OF ERROR IN CRIMINAL CASES MUST BE CONCLUSIVE—see APPEAL, 18.

ERROR IN ASSUMING GUILT IN CRIMINAL CASES—see CRIMINAL LAW, 7.

EXCLUSION OF RELEVANT TESTIMONY ERROR—see EVIDENCE, 17.

PRESUMPTION AGAINST WAIVER OF ERRORS—see WAIVER, 1.

ESTOPPEL.

1. **ESTOPPEL—ACCEPTANCE OF PERFORMANCE OF CONTRACT.** The acceptance of a performance differing from that contracted for, will estop the party so accepting, from afterwards taking advantage of the failure to perform in accordance with the contract. *Gilman v. Douglas County*, 27.

2. **ENTERING UNDER LEASE WRONGLY DESCRIBING LESSEE—ESTOPPEL.** Where the City of Hamilton entered upon and held certain premises under a lease purporting to run to the "Trustees of Hamilton City," but signed only by the lessor: *Held*, that the corporation was estopped from taking advantage of the fact that it was not correctly named in the lease. *Fitton v. Inhabitants of Hamilton City*, 196.
3. **LIABILITY OF SURETIES OF DE FACTO OFFICERS—RECITALS IN OFFICIAL BONDS—ESTOPPEL.** Where a person discharges the duties of an office as an officer *de facto* and not as a mere intruder, he and his sureties are estopped by the recitals in his official bond from denying that he is entitled to the office. *State v. Rhoades*, 352.
4. **ESTOPPEL IN PAYS.** To constitute an estoppel in pays it is essential among other things that the party relying on it should have been influenced by the acts or silence of the other, and been caused thereby to act as he would not otherwise have acted; else he cannot complain that he was deceived to his prejudice. *Sharon v. Minnock*, 377.
5. **ESTOPPEL MUST BE PLEADED.** An estoppel cannot be proved if it be not sufficiently pleaded. *Sharon v. Minnock*, 377.

POSSESSION OF LAND AFTER DEED NO NOTICE OF TRUST IN IT—ESTOPPEL—see POSSESSION, 1.

EVIDENCE.

1. **EVIDENCE OF CONTRACT—DIRECT PROOF AS OPPOSED TO PRESUMPTION.** Where an attorney proposed to do the legal business of a Mining Company for a certain period at a certain rate per month, the mere fact that his bills at that rate for several months had been allowed and paid, though sufficient to raise a presumption of the acceptance of his proposition, would not overbear direct evidence that the proposition was not submitted to or acted upon by the company, and consequently never accepted. *Hillyer v. Overman Silver Mining Co.*, 51.
2. **EVIDENCE OF SALES OF STOCK FOR ASSESSMENTS.** An indorsement by the secretary of a company on a certificate of stock, to the effect that the same had been sold for assessments, as well as evidence that the secretary had made statements to the same effect, is mere hearsay, and not competent to prove the fact of any sale for assessments. *Cahill v. Hirschman*, 57.
3. **BOOKS OF ACCOUNT—LEDGER AS EVIDENCE.** A stock-broker's ledger is not a book of original entry, and is not competent to prove an original purchase or transaction; but it is competent testimony in rebuttal in explanation of a bill sent by the broker to the principal, and to supplement the broker's own testimony that such bill was not general, as claimed, but only a partial bill. *Cahill v. Hirschman*, 57.
4. **PROOF OF CRIMINAL INTENT.** Criminal intent can only be proven as a deduction from declarations or acts; when the acts are established, the natural and

logical deduction is that defendant intended to do what he did do, and if he offers no excuse or palliation of the act done, such deduction becomes conclusive. *State v. McGinnis*, 109.

5. **PROOF OF "THEORY OF CASE."** If the establishment of a plaintiff's case depends upon the establishment of a theory, the correctness of the theory need not be established by any stronger proof than would be required for the case itself, which in general is only preponderating proof. *Silver Mining Company v. Fall*, 116.
6. **CONCLUSIVE PROOF NOT REQUIRED.** "Conclusive proof" is not required by the law; that degree of certainty is left to the domain of mathematics. *Silver Mining Company v. Fall*, 116.
7. **AMOUNT OF SECONDARY EVIDENCE TO ESTABLISH A FACT.** If evidence of a secondary character be admitted to establish a fact, there is no rule that requires more of such evidence than would be required of the best. *Silver Mining Company v. Fall*, 116.
8. **DECLARATIONS OF POSSESSOR TO CONTRADICT ALLEGED GIFT OF PERSONAL PROPERTY.** Where in a replevin suit for a wagon and horses, alleged to be the property of the estate of a deceased person, but claimed by defendant as a gift executed by deceased in his life-time, a witness testified that after the alleged gift he saw deceased in possession of the property, having the wagon repaired, and exercising other acts indicating ownership: *Held*, that the question, "Did the deceased tell you at that time that he was the owner of the property?" was not amenable to the objection that the evidence would be hearsay, and that to rule it out on that objection was error. *Rollins v. Strout*, 150.
9. **DECLARATION OF PARTY AS PART OF RES GESTÆ.** Declarations made by a party to an action, if a part of the *res gestæ*, are admissible in evidence even in his own favor; but only such declarations as are a part of the *res gestæ*, such as accompany acts pertinent to the case, are so admissible. *Rollins v. Strout*, 150.
10. **DECLARATIONS OF DECEASED PERSONS AS PART OF RES GESTÆ.** Where the issue was as to the fact of a gift having been made by plaintiff's testator and its consummation by delivery: *Held*, that acts of ownership exercised by deceased after the time of the alleged gift, and his declarations accompanying them, were part of the *res gestæ* and admissible in evidence. *Rollins v. Strout*, 150.
11. **FORGERY—PROOF OF EXISTENCE OF CORPORATION INJURED.** In a prosecution for forging a check upon an "Agency of the Bank of California": *Held*, that the facts of the existence of the corporation and of the agency might be made by oral testimony, and that the production of the certificate of incorporation was unnecessary. *State v. Cleveland*, 181.
12. **ALLEGATIONS AND PROOF AS TO PERSONS INJURED BY FORGERY.** In cases of forgery there are generally two persons who legally may be defrauded—the one

whose name is forged and the one to whom the forged instrument is to be passed, and the indictment may lay the intent to defraud either of them; and proof of an intent to defraud either and to pass the instrument as good, though there be shown no actual intent to defraud the particular person, will sustain the allegation. *State v. Cleveland*, 181.

13. **LEASE OF PREMISES AS EVIDENCE OF SALE OF GOODS.** Where it became an issue whether certain unbaled hay, which had been sold, had passed to the continued possession of the vendee as claimed by him: *Held*, that a lease by the vendor to the vendee of the premises in which the hay was kept was competent and material testimony for the vendee, and that it was error to prevent him from introducing it. *Conway v. Edwards*, 190.
14. **LEASE NOT SIGNED BY TENANT AS EVIDENCE AGAINST HIM.** In an action for rent against a tenant, who holds under a lease signed only by the lessor, such lease is admissible in evidence to show the conditions and reservations under which the possession is held. *Fitton v. Inhabitants of Hamilton City*, 196.
15. **DECLARATIONS OF VENDOR AFTER SALE.** In a question as to the validity, under the statute of frauds, of a sale of personal property, where the fact of the sale and change of possession was established: *Held*, that the declarations of the vendor made after such sale and change of possession were mere hearsay evidence, and not admissible to impeach or defeat the sale. *Lewis v. Wilcox*, 215.
16. **RELEVANCY OF EVIDENCE TENDING TO SUPPORT DEFENSE.** On a trial against the sureties on the official bond of a State treasurer, to recover for defalcation claimed to have taken place within the period covered by the instrument, it is competent for defendant to show that the defalcation occurred previous to the giving of the bond, and any testimony tending to support such defense is relevant and pertinent. *State v. Rhoades*, 352.
17. **EXCLUSION OF RELEVANT TESTIMONY ERROR.** Where in an action against the sureties on the official bond of a State treasurer for defalcation, defendants' counsel asked a witness as to the condition of the treasury at a time previous to that covered by the bond; and upon objection, on the ground of irrelevancy, counsel stated that he proposed to show that the defalcation complained of took place before the bond was given, and that to show such fact it was necessary to show the condition of the treasury as asked: *Held*, that the exclusion of the question and proposed testimony was error. *State v. Rhoades*, 352.
18. **TEST OF RELEVANCY OF EVIDENCE.** To ascertain whether evidence be relevant or not, it is only necessary to determine whether it has a tendency to establish a legitimate case or defense relied on. *State v. Rhoades*, 352.
19. **EVIDENCE—ORAL RESULT OF EXAMINATION OF LONG ACCOUNTS.** Where it became material and relevant to know the amount of money which should have been in the State treasury on a certain day: *Held*, that it was competent, under Sec. 427 of the Practice Act, as well as under the law independent of it, for an expert, who had made a full investigation of the accounts of the office, to state orally the result of his examination. *State v. Rhoades*, 352.

20. EVIDENCE—BOOKS OF STATE TREASURER PUBLIC RECORDS. In a suit against the sureties on the official bond of a State treasurer charged with defalcation: *Held*, that the entries in the books of the treasurer's office were competent evidence against the sureties without proof that they were made by or with the knowledge of the treasurer personally; such books being official (Stats. 1866, 57) and coming under the head of public records. *State v. Rhoades*, 352.
21. OBJECTIONS TO ADMISSION OF EVIDENCE TOO LATE AFTER EVIDENCE ADMITTED. Where a deed was admitted in evidence under insufficient objections to its validity for alleged want of title in the grantor; and afterwards, on motion for non-suit, further grounds of exception on account of its alleged want of proper execution were made to it: *Held*, that the latter objections were too late and therefore not available. *Sharon v. Minnock*, 377.
22. OBJECTIONS TO EVIDENCE TO BE MADE PROMPTLY. An objection to the admission of evidence should always be made at the earliest opportunity after the objection becomes apparent; if apparent when offered, it should be made then; if the evidence, apparently admissible when offered, is shown by subsequent developments to be exceptionable, the objection should then be made in the form of a motion to strike out. *Sharon v. Minnock*, 377.

NO REVERSAL WHERE EVIDENCE CONFLICTING—see APPEAL, 8.

ANY SUBSTANTIAL EVIDENCE WILL SUPPORT A JUDGMENT—see APPEAL, 9.

REVERSAL WHERE EVIDENCE INSUFFICIENT—see APPEAL, 19.

EVIDENCE BEFORE INFERIOR TRIBUNAL NOT TO BE INQUIRED INTO ON CERTIORARI—see CERTIORARI, 8.

EVIDENCE OF JURISDICTION TO REMOVE COUNTY SEAT—see COUNTY SEAT, 1.

INSUFFICIENCY OF EVIDENCE ON APPEAL—see CRIMINAL LAW, 1.

EVIDENCE OF GOOD CHARACTER IN CRIMINAL CASES—see CRIMINAL LAW, 2.

INDEPENDENT AND POSITIVE EVIDENCE AS TO CRIMINAL INTENT—see CRIMINAL LAW, 3.

EVIDENCE OF LOADING TO MAKE PISTOL DEADLY WEAPON—see CRIMINAL LAW, 5.

EVIDENCE TO CORROBORATE ACCOMPLICE—see CRIMINAL LAW, 12.

CHARGING CIRCUMSTANTIAL TO BE SUPERIOR TO DIRECT EVIDENCE, ERROR—see CRIMINAL LAW, 15.

ESTOPPEL CANNOT BE PROVED IF NOT PLEADED—see ESTOPPEL, 5.

ADMISSION OF ADVERSE ALLEGATIONS AND DISPENSING WITH PROOF—see PRACTICE, 3.

STATEMENT OF COUNSEL TO SHOW RELEVANCY OF TESTIMONY—see PRACTICE, 3.

INTIMATIONS OF COURT EXCLUDING EVIDENCE—see PRACTICE, 6.

DEVELOPMENT OF MINES—EVIDENCE—see PRACTICE ACT, 1.

SALE—EVIDENCE OF CONTINUED CHANGE OF POSSESSION—see SALE, 1.

JUDGE'S CERTIFICATE TO STATEMENT AS TO EVIDENCE ADDUCED ON TRIAL—see STATEMENT, 1, 2.

STATUTE OF FRAUDS—PROOF OF SALE—see STATUTE OF FRAUDS, 1.

TRANSCRIPT NOT CONTAINING ALL THE EVIDENCE—see TRANSCRIPT, 1.

EXCEPTION.

1. OBJECTION AS TO RIGHT TO EXECUTE DEED NOT OBJECTION AS TO EXECUTION. Where the only specification of objection to the introduction in evidence of a deed was that the alleged grantor, a corporation, had not been shown to have title: *Held*, not broad enough to cover an objection that the corporate seal had not been proved, nor any authority shown to affix it to the deed. *Sharon v. Minnock*, 377.

2. PARTICULAR GROUND OF EXCEPTION TO BE STATED. The particular ground of an objection or exception taken in the course of a trial is required to be stated, (Practice Act, Sec. 191) so that the court may decide intelligently upon it, and the opposite party be afforded an opportunity of obviating the objection if it be in his power to do so. *Sharon v. Minnock*, 377.

IRREGULARITIES OF PRACTICE NOT EXCEPTED TO—see APPEAL, 4.

OBJECTION TO ADMISSION OF EVIDENCE TOO LATE AFTER EVIDENCE ADMITTED—see EVIDENCE, 21, 22.

GROUND OF CHALLENGE OF JUROR TO BE SPECIFIED—see JURY, 2, 6.

EXCEPTIONS IN ACTION TO FORECLOSE MECHANICS' LIENS—see MECHANICS' LIENS, 1.

SPECIFICATION OF GROUNDS OF MOTION FOR NONSUIT—see NONSUIT, 1.

EXECUTION.

1. EXECUTION SALE—BID BY JUDGMENT CREDITOR—SATISFACTION. Where property of a judgment debtor was, on execution sale, struck off to the judgment creditor, and upon his refusal to pay, the sheriff proceeded to re-sell, whereupon the court, on motion, ordered the judgment creditor to enter satisfaction of the judgment: *Held*, that the order was error and must be set aside. *See* *ney v. Hawthorne*, 129.

2. **MERE STRIKING OFF TO JUDGMENT CREDITOR NOT SATISFACTION OF EXECUTION.** Where, on an execution sale, the judgment creditor bid in the property but refused to pay, and the property had to be offered again: *Held*, that the execution was not satisfied. *Sweeney v. Hawthorne*, 129.
- REQUISITES OF EXECUTION IN REPLEVIN—see REPLEVIN, 2.

FINDINGS.

1. **ERRONEOUS INDIVISIBLE PART OF FINDING.** If a finding contains erroneous matter, which cannot be divided from the remainder, the whole must fall. *Clark v. Nevada Land and M. Co.*, 203.

FIXTURES.

1. **FIXTURES—WHAT CANNOT BE.** A thing which is neither attached to the realty, nor placed upon the land with a view to making it permanent, nor essential to the full and complete enjoyment of the freehold, cannot become a fixture in any sense of the word. *Brown v. Lillie*, 244.
2. **A FIXTURE MUST BE CONNECTED WITH THE FREEHOLD.** Connection with or annexation to the freehold in some way is indispensable, as a general rule, to constitute a fixture. *Brown v. Lillie*, 244.
3. **INTENTION OF BUILDER AS TO FIXTURE.** The cases holding that the intention of the person making the annexation to real estate must determine whether the thing annexed be a fixture or not, are overborne by the great weight of authority the other way. *Brown v. Lillie*, 244.
4. **CHATELS NOT FIXTURES HAVE NO CHARACTER OF REALTY.** A personal chattel cannot be converted into real estate or given the character of realty, except by making it a fixture; and if not so attached to real estate as to become a fixture, it retains its character of personalty, entirely unmodified and unaffected by its situation. *Brown v. Lillie*, 244.
5. **SAW MILL—WHEN NOT A FIXTURE.** A saw mill built upon timbers lying upon the surface of the ground and constructed with the object and purpose, after sawing the timber within a convenient distance, to be removed to another locality, is a mere personal chattel, and will not pass by a conveyance or patent of the land. *Brown v. Lillie*, 244.

FORFEITURE.

FORFEITURE OF TOLL ROAD FRANCHISE—see ROADS, 2.

FORGERY.

FORGERY OF CHECK PAYABLE TO "SAPPHIRE MILL OR BEARER"—see CRIMINAL LAW, 9.

PROOF OF EXISTENCE OF CORPORATION INJURED BY FORGERY—see EVIDENCE, 11, 12.

INDICTMENT FOR FORGERY—see INDICTMENT, 1.

FORGERY OF CHECK ON "AGENCY OF BANK OF CALIFORNIA"—see PROMISSORY NOTES, 2.

FRANCHISE.

EFFECT OF FORFEITURE ON TOLL ROAD FRANCHISE—see ROADS, 2.

FRAUD.

1. INSURANCE—FRAUD—QUESTIONS OF LAW AND FACT. Where a contract of insurance provided that fraud in a claim made under it for a loss, or a false declaration or affirmation in support thereof, should forfeit all benefit under the policy: *Held*, that whether there was such fraud, or false declaration or affirmation, was a matter for the jury to decide under proper instructions of the court. *Gerhauser v. North British and M. Ins. Co.*, 15.

GIFT.

DECLARATIONS OF POSSESSOR TO CONTRADICT ALLEGED GIFT OF CHATTELS—see EVIDENCE, 8.

GOLD COIN.

(See CURRENCY.)

HAMILTON CITY.

1. HAMILTON CITY PAROL CONTRACTS. The charter of Hamilton City providing that "all scrip and bonds issued and contracts and agreements made shall be signed by the president and countersigned by the clerk," (Stats. 1869, 165, Sec. 14) does not prohibit parol contracts by the city, but only designates the manner in which written contracts shall be executed. *Pittou v. Inhabitants of Hamilton City*, 196.

HUSBAND AND WIFE.

1. CHOSSES IN ACTION BELONGING TO HUSBAND AND WIFE. Under the provision of the statute relating to husband and wife, (Stats. 1864-5, 240) the husband, for the purpose of bringing suits upon choses in action which are common property and so far as the disposition of such property is concerned, is the sole owner, and he alone is the proper party to bring actions upon them. *Crow v. Van Sickle*, 146.

COMPLAINT BY HUSBAND ON NOTE GIVEN TO WIFE—see PROMISSORY NOTES, 1.

INDICTMENT.

1. **FORGERY OF BANK CHECK—INTENT TO DEFRAUD PRETENDED DRAWER.** Where an indictment for forgery of a check on a bank alleged an intent to defraud the drawer: *Held*, that though in one sense such drawer could not be defrauded, as he could not be held to pay forged paper, yet, as he might have paid, had the forgery not been discovered, and as the forger could not have intended a discovery, there was an existent possibility of fraud upon him, and that was sufficient. *State v. Cleveland*, 181.
2. **VENUE MATERIAL IN INDICTMENTS.** An allegation of the county wherein a crime was committed is as material in an indictment as any fact constituting the body of the offense. *State v. Chamberlain*, 257.
3. **STATUTORY FORM OF INDICTMENT DEFECTIVE.** The form of an indictment given in the statute of 1867, (Stats. 1867, 126) is insufficient in so far as it omits the venue. *State v. Chamberlain*, 257.
4. **AMENDMENT OF INDICTMENT.** A court has no more power to add any material charge, accusation or allegation to an indictment, than it has to find a bill in the first instance. *State v. Chamberlain*, 257.
5. **INDICTMENT—COUNTS SETTING OUT OFFENSE IN DIFFERENT FORMS.** Where an indictment for robbery contained two counts, the only difference being that one charged the property taken as that of Wells, Fargo & Co., and the other as that of their messenger in custody thereof at the time: *Held*, authorized under Sec. 238 of the Criminal Practice Act, and not amenable to the objection of charging more than one offense. *State v. Chapman*, 320.
6. **INDICTMENT AGAINST ACCESSORY BEFORE THE FACT.** In an indictment against an accessory before the fact, it is not necessary to state the special act which the accused may have done in active or passive aid of the ultimate act; but only the ultimate act itself, the same as in case of a principal. *State v. Chapman*, 320.

OMISSION OF VENUE IN INDICTMENT NOT AMENDABLE—see AMENDMENT, 1.

INJUNCTION.

1. **DISCRETION IN GRANTING PRELIMINARY INJUNCTIONS—PRACTICE ON APPEAL.** The granting of a preliminary injunction by a district court is very much a matter of discretion, and when it is granted on a complaint exhibiting a *prima facie* case, and there is no answer put in, and no showing made that any defense on the merits exists, the order will not be disturbed. *Hobart v. Ford*, 77.

SUFFICIENCY OF COMPLAINT FOR INJUNCTION TO STAY WASTE—see PLEADING, 4.

TAX SALES OF PERSONAL PROPERTY—INJUNCTION—see TAXES, 4.

NO INJUNCTION TO PREVENT DAMAGES RECOVERABLE AT LAW—see TAXES, 4.

INSTRUCTIONS.

(See CHARGE.)

INSURANCE.

1. CONDITION INDORSED ON INSURANCE POLICY. Where a condition indorsed on a policy of insurance provided that in case the insured committed fraud in the claim made for a loss, or made a false declaration or affirmation in support thereof, he should forfeit all benefit under the policy, and under any other policy granted him by the company on other property: *Held*, that such condition was to be construed as an express part of the contract. *Gerhauer v. North British & M. Ins. Co.*, 15.

INSURANCE—FRAUD—QUESTIONS OF LAW AND FACT—see FRAUD, 1.

INTENT.

CRIMINAL INTENT MUST BE SHOWN—see CRIMINAL LAW, 6.

PROOF OF CRIMINAL INTENT—see EVIDENCE, 4.

INTERVENTION.

1. DISMISSAL OF ACTION BY PLAINTIFF NOT TO AFFECT INTERVENORS. Where O'Connell & Splain commenced a suit to foreclose a mechanics' lien against Ivers & Cook; and Elliott, and Petty and Doane intervened as lien claimants, and after appearance put in by defendants to the interventions, O'Connell & Splain filed a dismissal of the suit; *Held*, that the dismissal could not affect the rights of the intervenors, and that they had a right to adjudication as between themselves and defendants. *Elliott v. Ivers*, 287.

JOINT DEBTORS.

1. PROCEEDINGS AGAINST JOINT DEBTORS WHERE ONE BANKRUPT. In a suit against joint debtors, where one set up his co-defendant's adjudication in bankruptcy and, during a stay of proceedings until final adjudication, admitted the allegations of the complaint; and where after final adjudication plaintiff amended, set up the discharge in bankruptcy, dismissed as to the bankrupt, and on default of the other defendant, took judgment against him: *Held*, that although the proceedings in allowing the amendment were unnecessary and somewhat irregular, there was no injury to defendant and no error in the judgment. *Dorn v. O'Neale*, 155.

JUDGMENT.

1. JUDGMENT FOR GOLD COIN OR ITS EQUIVALENT. A judgment on a promissory note payable in gold coin or its equivalent in United States legal tender notes,

should be in the alternative, and provide that if default be made in the payment of gold coin, then, as compensation therefor, an amount in legal tender notes, equal in value at the time and place of trial to such gold coin, should be paid. *Wells, Fargo & Co., v. Van Sickle*, 45.

2. WHEN JUDGMENT CREDITOR MAY BE ORDERED TO SATISFY JUDGMENT. It is only when a judgment is satisfied "otherwise than upon execution" (Practice Act, Sec. 210) that a court may order the judgment creditor to make acknowledgment of that fact. *Sweeney v. Hawthorne*, 129.
3. ERROR PRESENTED BY JUDGMENT ROLL. In a suit on a money demand, where the recovery was for a sum less than three hundred dollars and costs: *Held*, that the error in the judgment for costs being apparent from the judgment roll itself, might be corrected on appeal from the judgment without a statement. *Klein v. Allenbach*, 159.
4. JUDGMENT FOR DEFENDANT "NON OBSTANTE VEREDICTO," ERROR. When there was a verdict for plaintiff, and defendant moved for judgment *non obstante veredicto* and obtained it: *Held*, that such a motion, if allowable at all under the Practice Act, was only a motion for plaintiff, and that the action of the court was erroneous. *Broten & Egar v. Lillie*, 177.
5. GOLD COIN JUDGMENTS FOR DAMAGES. Under Sec. 202 of the Practice Act (Stats. 1869, 228) a judgment in gold coin for damages is proper. *Clark v. Nevada Land and M. Co.*, 203.

WHAT CONSIDERED AN APPEAL FROM JUDGMENT—see APPEAL, 5.

ANY SUBSTANTIAL EVIDENCE WILL SUPPORT A JUDGMENT—see APPEAL, 9.

JUDGMENT CORRECT THOUGH REASON WRONG—see APPEAL, 10.

JUDGMENT WHERE ONE JOINT DEBTOR BECAME BANKRUPT—see BANKRUPTCY, 1.

JUDGMENTS WILL NOT BE REVERSED FOR ERROR THAT DOES NOT PREJUDICE—see ERROR, 1, 2.

JUDGMENT WHERE ONE JOINT DEBTOR BANKRUPT—see JOINT DEBTORS, 1.

JURISDICTION OF COURTS TO RENDER JUDGMENT—see JURISDICTION, 6.

INTENDMENTS IN FAVOR OF COMPLAINT AFTER JUDGMENT—see PLEADING, 5.

JUDGMENTS IN REPLEVIN—see REPLEVIN, 1, 2, 5.

NO LEGAL JUDGMENT ON VERDICT IRRESPONSIVE TO PLEADINGS—see VERDICT, 2.

JUDICIAL DISTRICTS.

1. LINCOLN COUNTY FOR A TIME IN NO JUDICIAL DISTRICT. Lincoln County was created and made a part of the Fifth Judicial District by Act of February 26th,

1866, (Stats. 1866, 131). The next day, (Stats. 1866, 139) the Judicial Districts of the State were changed, and the Fifth District made to consist of Humboldt County, no provision whatever being made for Lincoln: *Held*, that Lincoln County was not included in any Judicial District after February 27th, 1866, until the taking effect of the Act of 1867, (Stats. 1867, 129) which made it the Ninth Judicial District. *Leake v. Bladell*, 40.

JURISDICTION.

1. **JURISDICTION OF DISTRICT COURTS—COSTS.** A suit for the recovery of money may be brought in a district court by simply claiming three hundred dollars or upwards, although less may be actually due; but if less than three hundred dollars is recovered, the plaintiff is not entitled to costs. *Klein v. Allenbach*, 159.
2. **TEST OF JURISDICTION.** The test of the jurisdiction of the district courts in cases of money demands is the amount claimed in the complaint—the demand in controversy being the sum sought to be recovered by plaintiff, and not that for which he actually recovers judgment. *Klein v. Allenbach*, 159.
3. **JURISDICTION OF SUPREME COURT.** The language of the constitution conferring jurisdiction upon the supreme court in cases of money demands, (Art. VI, Sec. 4) is identical with that respecting the district courts, (Art. VI, Sec. 6) and whenever the district court has jurisdiction in the first instance, the supreme court has jurisdiction to review its action on appeal. *Klein v. Allenbach*, 159.
4. **JURISDICTION OF FEDERAL JUDICIARY.** The decisions of the United States supreme court, upon questions of the jurisdiction of the Federal judiciary, are final and controlling. *Feusier v. Lammon*, 209.
5. **JURISDICTION OF STATE COURTS, AS TO GOODS SEIZED UNDER UNITED STATES PROCESS.** Where goods are seized and held by a marshal under valid process from an United States court, such process is a complete defense, and gives him the right to hold the property, against any writ issued from a State court. *Feusier v. Lammon*, 209.
6. **JURISDICTION OF COURTS TO RENDER JUDGMENT.** The jurisdiction of a court to render judgment in a cause is coëxtensive with its authority to inquire into the facts. *Feusier v. Lammon*, 209.
7. **JURISDICTION OF SUPREME COURT TO REVIEW EVIDENCE IN CRIMINAL CASES?** Is it within the jurisdiction of the supreme court (Const., Art. VI, Sec. 4) to review the evidence in a criminal case, and decide that it does not sustain the verdict? *State v. Van Winkle*, 340.

JURISDICTION THE QUESTION INVOLVED ON CERTIORARI—see CERTIORARI, 1,

POWERS OF COUNTY COMMISSIONERS SPECIAL AND LIMITED—see COUNTY COMMISSIONERS, 2, 3.

EQUITY JURISDICTION—REMEDY AT LAW—see EQUITY, 1.

JURISDICTION OF MECHANICS' LIENS—see PRACTICE, 4.

JURY.

1. JUROR—CHALLENGE FOR CAUSE. Where a juror on examination as to his qualifications said that he had heard something of the matter, and had an impression which it would require testimony to remove, that he had no bias and his impression was very vague, and that he had never talked with any one who pretended to know the facts: *Held*, that a challenge for cause was properly overruled. *Estes v. Richardson*, 128.
2. GROUNDS OF CHALLENGE FOR CAUSE TO BE SPECIFIED. The grounds of challenge to jurors for cause are pointed out by statute, and a party desiring to have such challenge tried must specify the ground or grounds upon which he bases it. *Estes v. Richardson*, 128.
3. PRESUMPTION THAT JURIES FOLLOW INSTRUCTIONS. The presumption in all cases of jury trials is that the jury apply the law as given by the court, and upon such law and the evidence render their verdict; and no appellate court can decide the effect of the one separate from the other. *Johnson v. Wells, Fargo & Co.*, 224.
4. "TREATING THE JURY" CAUSE OF REVERSAL. Where, during the progress of a trial and before retiring to deliberate, and while under charge of an officer for the purpose of viewing the ground in controversy, the jury went into a saloon and drank liquor at the expense of the prevailing party: *Held*, that the verdict and judgment thereon should be set aside. *Sacramento and Meredith M. Co. v. Showers*, 291.
5. WHAT TAMPERING WITH JURY AVOIDS VERDICT. The rule, that a verdict in favor of a party who treats or entertains the jury will be set aside, applies to any treating of any of the jury at any time after they are sworn and before they agree upon their verdict, whether once or several times, by design or inadvertently, in the presence of the officer or in his absence, and whether it might be called for or uncalled for by the proprieties of life. *Sacramento and Meredith M. Co. v. Showers*, 291.
6. CHALLENGE TO JUROR MUST SPECIFY GROUNDS. Where the only specification of ground of challenge to a juror was "for cause": *Held*, entirely insufficient, and that on appeal no objection would be entertained. *State v. Chapman*, 320.

JURIES NOT MISLED BY UNOBJECTIONABLE INSTRUCTIONS—see CHARGE, 2.

LANDLORD AND TENANT.

1. EFFECT OF HOLDING UNDER LEASE NOT SIGNED BY TENANT. Where a tenant took and held possession of premises under a lease not signed by him: *Held*, that his acceptance of possession was equivalent to an execution of the instrument. *Fitton v. Inhabitants of Hamilton City*, 196.

LEASE—TERM CREATED BY HOLDING OVER—see LEASE, 2.

RENT OF PUBLIC BUILDING LEASED TO STATE—see LEASE, 3.

NATURE OF ACTION FOR RENT ON LEASE NOT SIGNED BY TENANT—see RENT, 1.

LANDS.

RIGHT OF WAY OVER PUBLIC LANDS WITHOUT COMPENSATION—see EMINENT DOMAIN, 1.

PRESUMPTION OF CLAIM TO ENTIRE TRACT OF LAND BY ENTRY UNDER DEED—see ENTRY, 1.

POSSESSION OF LAND AFTER DEED NO NOTICE OF TRUST IN IT—see POSSESSION, 1.

LEASE.

1. ENTERING AND HOLDING UNDER LEASE NOT SIGNED BY TENANT. If a person obtain possession and occupy premises under lease, (though not signed by him) he should be holden to accept subject to all the covenants and obligations of the instrument. *Fitton v. Inhabitants of Hamilton City*, 196.
2. LEASE—TERM CREATED BY HOLDING OVER. Where a tenant under a lease for three months held over after the expiration of the term with the consent of the landlord : *Held*, that a new term of three months was created, and that it was no answer to the landlord's claim for rent for such new term, that the tenant did not occupy the premises for the whole of it. *Fitton v. Inhabitants of Hamilton City*, 196.
3. RENT OF PUBLIC BUILDINGS LEASED TO STATE. Under the Act of 1869, providing for the payment of claims against the State "for services or advances," (Stats. 1869, 104): *Held*, that the rent of premises occupied by the State was embraced within the meaning of the word "advances." *Ormsby County v. State of Nevada*, 265.

LEASE OF PREMISES AS EVIDENCE OF SALE OF GOODS—see EVIDENCE, 13.

LEASE NOT SIGNED BY TENANT AS EVIDENCE AGAINST HIM—see EVIDENCE, 14.

STATUTE RELATING TO TENANTS HOLDING OVER—see STATUTES, 8.

LEGISLATURE.

1. LEGISLATIVE POWER—PREFERRING CLAIMS. The legislature undoubtedly has the power to direct that certain claims against a county shall have a preference over all others which are not so situated as to give the holder a vested right to money in or to come into the treasury. *Humboldt County v. Churchill County Commissioners*, 30.

CONTRACT BETWEEN COUNTY AND RAILROAD MADE BY LEGISLATURE—see CONTRACT, 4.

JUDICIAL POWER AS TO STATUTES—see STATUTES, 3.

STATUTES THE EXPRESSION OF FREE LEGISLATIVE WILL—see STATUTES, 4.

LINCOLN COUNTY.

CREATION OF LINCOLN COUNTY BY ACT OF 1866—see COUNTIES, 1.

LINCOLN COUNTY FOR A TIME IN NO JUDICIAL DISTRICT—see JUDICIAL DISTRICTS, 1.

MANDAMUS.

1. **MANDAMUS—COMMAND OF WRIT.** Where a discretion is to be exercised by an officer as to the manner in which an act may be done, or the act depends upon his judgment, a writ of mandate directed to him will not control his discretion, but only command him to act without in any way interfering with the manner of his action; but where, on the contrary, a specific act is required to be done and no discretion given, the writ may command the doing of the very act itself. *Humboldt County v. Churchill County Commissioners*, 30.
2. **MANDAMUS—PREVIOUS DEMAND WHEN NECESSARY.** When the performance of the duty sought to be enforced by mandamus is of a character that could not be expected to be performed until demanded, the writ should not issue until demand made; but when the law unconditionally requires the doing of the specified act, no demand is necessary. *Humboldt County v. Churchill County Commissioners*, 30.
3. **MANDAMUS—OMISSION OF DUTY BY COUNTY COMMISSIONERS.** Where county commissioners were by statute absolutely required to set apart certain funds in the treasury for a specific purpose, and refused or neglected to do so: *Held*, that mandamus was the only plain, speedy and adequate remedy to compel them to do their duty. *Humboldt County v. Churchill County Commissioners*, 30.

MARRIAGE.

1. **MARRIAGE STATUTE—MARRIAGEABLE AGE.** The proviso in the marriage act against the illegitimacy of the issue of a marriage of persons not of lawful age, (Stats. 1867, 88) does not indicate any intention on the part of the legislature to render marriages of males between eighteen and twenty-one, or of females between sixteen and eighteen, void on account of being made without the consent of parents or guardians. *Fitzpatrick v. Fitzpatrick*, 63.
2. **LAWFUL AGE OF MARRIAGE, WHAT.** The lawful age of marriage in this State is eighteen years in males and sixteen years in females; and marriages made by persons of such age are valid and binding, though made without consent of parents or guardians. *Fitzpatrick v. Fitzpatrick*, 63.

MAXIMS.

EXPRESSIO UNIUS EXCLUSIO ALTERIUS—see CONSTRUCTION, 2.

MECHANICS' LIENS.

1. PROCEEDINGS TO FORECLOSE MECHANICS' LIENS. The statute relating to mechanic's liens (Stats. 1861, 36) contemplates a formal suit, a publication of notice, an appearance upon the part of lien claimants other than those commencing the suit, and a disposition of the entire matter of liens against the property affected, in one proceeding; and any person prejudiced by error in the proceeding may object. *Elliott v. Ivers*, 287.
2. NOTICE OF SUIT TO FORECLOSE MECHANIC'S LIEN. The failure of a plaintiff, in an action to foreclose a mechanic's lien, to publish notice of the suit will not deprive a lien claimant, who intervenes in the action, of his right to have an adjudication of his claim. *Elliott v. Ivers*, 287.

MINES.

1. ARIZONA SILVER LEDGE—PROOF REQUIRED TO SUPPORT A PLAINTIFF'S THEORY. Where it appeared that plaintiff owned the Arizona Silver Ledge south of a certain line, and defendant owned north of the line, and suit was brought to recover a deposit and prevent defendant working at a point south of the line, on the theory that it was on the ledge, which defendant denied: *Held*, error in the court to instruct the jury, that to entitle the plaintiff to recover he must establish his theory conclusively, and not merely by a preponderance of evidence. *Silver Mining Company v. Fall*, 116.
2. WHITE PINE MINING LAWS—NECESSARY WORK PER YEAR TO HOLD MINE. Under the mining laws of White Pine District, as amended in July, 1867, it requires only two days work to hold a "location" for a year; and such location means an entire mining claim, irrespective of the number of locations or feet. *Leet v. John Dare S. M. Co.*, 218.

EVIDENCE OF SALES OF STOCK FOR ASSESSMENTS—see EVIDENCE, 2.

DEVELOPMENT OF MINES—EVIDENCE—see PRACTICE ACT, 1.

RIGHT OF WAY OVER PUBLIC LANDS FOR MINING DITCHES—see WATER RIGHTS, 1.

MORTGAGE.

1. MORTGAGEE FOR PRE-EXISTENT DEBT WHEN REGARDED AS BONA FIDE PURCHASER FOR VALUE. Where Howard was indebted to Fair, and executed to him a note for the debt, and a mortgage on certain real estate to secure the same: *Held*, that Fair, as to the land and mortgage, occupied the position of a bona fide purchaser for value; and that his right would prevail as against the equity of Armstrong, for whom Howard held half the land in trust, the declaration of which trust was, however, not put on record until after the mortgage. *Fair v. Howard*, 304.

MOTIONS.

COSTS ON MOTIONS—see COSTS, 2.

MOTION FOR NEW TRIAL—PRACTICE AS TO NOTICE—see NEW TRIAL, 2, 3.

SPECIFICATION OF GROUNDS OF MOTION FOR NONSUIT—see NONSUIT, 1.

NOTICE OF MOTION TO RETAX COSTS—see RULES OF COURT, 2.

MOTION TO RETAIN PLACE OF TRIAL—see VENUE, 3, 5.

MOTION FOR JUDGMENT "NON OBSTANTE VEREDICTO"—see VERDICT, 1.

NEGLIGENCE.

CARE REQUIRED BY VIRGINIA CITY IN REGARD TO STREETS—see CORPORATIONS, 3.

DAMAGES FOR NEGLIGENCE OF PASSENGER CARRIERS—see DAMAGES, 6, 7.

NEW TRIAL.

1. AUTHENTICATION OF STATEMENT ON NEW TRIAL. Where a statement on motion for new trial is not authenticated in the mode prescribed by statute, it is a good ground for denying the motion. *White v. White*, 20.
2. MOTION FOR NEW TRIAL—WAIVER OF NOTICE OF DECISION. Though a party in cases tried by the court is not required to move for a new trial until "ten days after receiving written notice of the rendering of the decision of the judge," yet if he proceed in the case upon actual knowledge of such decision, he waives his right to written notice. *Corbett v. Swift*, 194.
3. TIME TO MOVE FOR NEW TRIAL—PRACTICE ACT, SEC. 197. Under section one hundred and ninety-seven of the Practice Act, a party in a case tried by the court has "ten days after receiving written notice of the rendering of the decision of the judge" to move for a new trial, and as long as he does not act, waiving his right, no advantage can be taken of the fact that he has had actual knowledge. *Corbett v. Swift*, 194.
4. NEW TRIALS NOT MATTERS OF DISCRETION. The granting or refusing a new trial is not a matter of mere discretion. *Sacramento and Meredith M. Co. v. Showers*, 291.

STRIKING OUT ON APPEAL UNAUTHENTICATED STATEMENT ON NEW TRIAL—see APPEAL, 1.

ISSUES ON APPEAL FROM NEW TRIAL ORDER—see APPEAL, 2.

STATEMENT ON APPEAL FROM NEW TRIAL ORDER—see APPEAL, 12.

WAIVER OF RIGHT TO MOVE FOR NEW TRIAL—see WAIVER, 3.

NONSUIT.

1. SPECIFICATION OF GROUNDS OF NONSUIT. The grounds urged for a nonsuit are required to be as specifically designated as any other exceptions or objections taken in the course of a trial. *Sharon v. Minnock*, 377.

NOTICE.

NOTICE OF SUIT TO FORECLOSE MECHANICS' LIENS—see MECHANICS' LIENS, 2.

MOTION FOR NEW TRIAL—PRACTICE AS TO NOTICE OF MOTION—see NEW TRIAL, 2, 3.

POSSESSION OF LAND AS NOTICE OF TRUST IN IT—see POSSESSION, 1.

RECORD OF DEED—CONSTRUCTIVE NOTICE OF CONTENTS TO WHOM—see RECORD, 1.

NOTICE OF MOTION TO RETAX COSTS—see RULES OF COURT, 2.

OFFICERS.

1. RIGHTS OF COUNTY OFFICERS TO COUNTY REVENUE FOR SALARIES. The county officers of Churchill County had no such vested right to the money in the treasury for the payment of their salaries, as to prevent the operation upon such money of the Act of 1869, (Stats. 1869, 88) providing for the payment of certain money yearly by Churchill to Humboldt County. *Humboldt County v. Churchill County Commissioners*, 30.
2. TERMS OF OFFICE OF DISTRICT JUDGES. The Lincoln County Act, (Stats. 1867, 129) in so far as it provided that the district judge to be elected in 1868 should hold his office for two years from January 1st, 1869, did not violate the constitutional provision (Art. VI, Sec. 5) as to terms of district judges. *State ex rel. Hubbard v. Gorin*, 265.
3. SURRENDER OF FIRST TERM BY OFFICER RE-ELECTED. Where an officer on being reelected accepted a commission, and took the oath of office for the new term, and presented a bond therefor, which, however, was not approved, and he failed to present a new one in the time prescribed by law: *Held*, that he had relinquished all claim to continue to hold over under the former term. *State v. Rhodes*, 352.
4. OFFICERS DE FACTO. A person discharging the duties of a public office under color of right, is an officer *de facto* and not a mere intruder. *State v. Rhodes*, 352.

POWER OF COUNTY ASSESSOR TO APPOINT DEPUTIES—see ASSESSOR, 2.

UNAUTHORIZED STATEMENTS BY OFFICERS OF CORPORATION DO NOT BIND IT—see CORPORATION, 1.

MANDAMUS AGAINST OFFICERS HAVING DISCRETION—see MANDAMUS, 1.

LIABILITY OF SURETIES ON BONDS OF DE FACTO OFFICER—see SURETIES, 1.

ORDER.

1. ORDER APPEALABLE ONLY IN PART. Where, upon a rule to show cause why an injunction should not issue, an order was made that defendants, in consideration of their retaining control of the premises in controversy, should give a bond to pay all damages that plaintiff might sustain; that in default thereof, a receiver should be appointed; and that defendants might make improvements, but not remove any improvements already made, nor commit waste: *Held*, that if the order was appealable at all, it was only, in so far as it placed an injunction upon defendants. *Meadow Valley M. Co. v. Dodds*, 261.
2. ORDER EMBRACING DISTINCT AND INDEPENDENT ORDERS. Where an order embraces matters really independent and distinct, the mere fact that they are so embraced or made at the same time and written on the same paper, does not make them one and the same order. *Meadow Valley M. Co. v. Dodds*, 261.
3. INTENDMENTS IN FAVOR OF COMPLAINT AFTER ORDER BASED UPON IT. The rule that carries every legal intendment in favor of a complaint in case there has been a judgment thereon after issue joined, equally applies in case of an order, such as an injunction, made upon it after a full hearing. *Meadow Valley M. Co. v. Dodds*, 261.

STATEMENT ON APPEAL FROM NEW TRIAL ORDER—see APPEAL, 2, 12.

"ORDERS" REQUIRING SEPARATE STATEMENTS ON APPEAL NOT NEW TRIAL ORDERS—see APPEAL, 11.

PARTIES.

1. PARTIES PLAINTIFF IN SUIT ON REPLEVIN BOND—DEMURRER FOR MISJOINDER. An action on an undertaking given to the sheriff upon the return of property replevied, (Practice Act, Sec. 104) should be brought in the name of the real party in interest; and where the name of the sheriff was joined with his as plaintiff: *Held*, that the complaint was clearly demurrable for misjoinder of parties plaintiff. *McBeth v. Van Sickle*, 134.
2. PERSONS WITHOUT INTEREST NOT TO BE PLAINTIFFS. While the Practice Act (Sec. 12) declares that all persons having an interest in the subject of an action, and in obtaining the relief demanded, may be joined as plaintiffs, the converse of the proposition is also true, that none can be united who have not such interest. *McBeth v. Van Sickle*, 134.
3. WIFE NOT A PARTY TO ACTION TO RECOVER COMMON PROPERTY. In a suit on a note given in the name of a wife, though in fact the common property of herself and husband, she has no such interest as to make her a necessary or proper party. *Crow v. Van Sickle*, 146.

PAYMENT.

1. RECEIVING PAYMENT IN TREASURY NOTES UNDER PROTEST. When a person entitled to be paid in coin receives payment in treasury notes, though at the same time protesting against payment in that kind of currency, he cannot retain such notes at a value not assented to by the other party, nor recover the difference in value between them and coin. *Gilman v. Douglas County*, 27.

PLACE OF TRIAL.

(See VENUE.)

PLEADING.

1. PLEADING—AFFIRMATIVE MATTER IN ANSWER CONSIDERED DENIED. Under the practice in this State, all affirmative matter in an answer is taken as denied. *Cahill v. Hirschman*, 57.
2. PLEADING—HUSBAND'S OWNERSHIP OF COMMON PROPERTY. In a complaint by a husband to recover a chose in action given in the name of his wife, but belonging to the community, it is sufficient for him, to show his right of action, to allege either that he is the owner or that it is common property, and even both allegations in the same complaint will not render it demurrable. *Crow v. Van Sickle*, 146.
3. PLEADING—CHARACTER OF CORPORATIONS DEFENDANT. In an action on a note and mortgage, where a corporation was made a party defendant as having some interest: *Held*, that it was not necessary to allege whether it was a foreign or domestic corporation, nor for what purpose it was incorporated. *Crow v. Van Sickle*, 146.
4. SUFFICIENCY OF COMPLAINT FOR INJUNCTION TO STAY WASTE. Where a complaint alleged that plaintiff was the owner and entitled to the possession of lands, that there were improvements thereon, that defendants were in possession and threatened to destroy and would if not enjoined destroy such improvements, and that defendants were insolvent and unable to respond in damages: *Held*, sufficient to support an order enjoining defendants from removing the improvements or committing waste. *Meadow Valley S. M. Co. v. Dodds*, 261.
5. INTENDMENTS IN FAVOR OF COMPLAINT AFTER JUDGMENT. After a verdict or decision in a District Court upon issue joined, the complaint will be supported by every legal intendment, if there be nothing material in the record to prevent it. *Meadow Valley S. M. Co. v. Dodds*, 261.
6. PLEADING OF ESTOPPEL IN PALS. In pleading facts to show an estoppel in pals, it is necessary to set forth every essential element of such an estoppel; and among other things, that the party relying on it was influenced in his conduct by the acts or silence of the other. *Sharon v. Minnock*, 377.

DEFENSE PLEADED PRESUMED TO BE INSISTED ON—see BANKRUPTCY, 1.

MISJOINDER OF PARTIES PLAINTIFF IN SUIT ON REPLEVIN BOND—see PARTIES, 1.

NO LEGAL JUDGMENT ON VERDICT IRRESPONSIVE TO PLEADINGS—see VERDICT, 2.

POSSESSION.

1. POSSESSION OF LAND AS NOTICE OF TRUST IN IT—ESTOPPEL. Where Armstrong being the owner of land, deeded it to Howard by conveyance absolute on its face, but with an understanding that Howard was to hold one-half the land in trust for him; and after recording the conveyance, Armstrong remained in possession of the land: *Held*, that he was estopped from relying on his continuance in possession as notice of the trust. *Fair v. Howard*, 304.

OFFICER'S RIGHT OF POSSESSION OF PROPERTY ATTACHED — see ATTACHMENT, 1, 2.

CHANGE OF POSSESSION ON SALE—see SALE, 1, 2, 3, 4.

POSSESSION OF WATER RIGHTS—see WATER RIGHTS, 3.

PRACTICE.

1. RIGHT UNDER LAW OTHER THAN LAW SPECIALLY RELIED ON. Where a plaintiff attempted to construct a flume for mining purposes over certain public land, and being prevented by the person in possession, brought an injunction suit to prevent such person's further resistance: *Held*, that though plaintiff claimed the right of way to construct his flume under the State law, he was not by such claim prevented from relying also upon the act of congress giving such right, the facts pleaded being sufficient to bring him within the act. *Hobart v. Ford*, 77.
2. CONVENIENCE OF WITNESSES. Where a suit to recover money was brought in Storey County, against a resident of White Pine County, and defendant moved on the ground of his residence to change the place of trial to White Pine County: *Held*, that he had an absolute right, under the Practice Act, (Sec. 20) to the change, and that counter affidavits to retain the case on account of the convenience of witnesses constituted no defense and could not be considered. *Williams v. Keller*, 141.
3. ADMISSION OF ADVERSE ALLEGATIONS—RIGHTS OF PARTIES NOT ADMITTING. A party to the record may admit any adverse allegation and thus dispense with proof of it; though if the admission be not of a conceded fact, any other party, other than the one originally making the allegation, may make proof in opposition. *Dorn v. O'Neale*, 155.
4. FORECLOSURE OF MECHANICS' LIEN—RIGHTS OF INTERVENORS. Where in a suit to foreclose a mechanics' lien, certain lien claimants intervened, and defendants

answered and demurred to their interventions; *Held*, that the court acquired jurisdiction of the subject matter, and the parties, and the whole thereof; and that the plaintiff could not, by a dismissal of the suit, prevent an adjudication as to the rights of the intervenors. *Elliott v. Ivers*, 287.

5. **STATEMENT OF COUNSEL TO SHOW RELEVANCY OF TESTIMONY.** Where a defendant asked a witness a question which, under the pleadings, appeared directed to proof of irrelevant matter; and upon objection made on that ground, counsel stated the character of his defense; and it appeared that the proposed defense was admissible, and the question one the answer to which might tend to support it: *Held*, that the proposed testimony was relevant, and the exclusion of the question error. *State v. Rhodes*, 352.
6. **INTIMATIONS OF COURT EXCLUDING EVIDENCE.** Where a witness was called for the purpose of proving a certain fact; and the court, in ruling out a question in any way calculated to elicit testimony to establish it, informed counsel that proof of such fact would not be admitted: *Held*, that the action of the court was to be treated as a decision ruling out evidence of such fact, and that it was unnecessary for counsel to persist in efforts to prove it. *State v. Rhodes*, 352.

IRREGULARITIES OF PRACTICE NOT OBJECTED TO—see **APPEAL**, 4.

PRACTICE—DISMISSAL OF APPEAL—see **APPEAL**, 7.

RELIEF ON APPEAL FROM ORDER APPEALABLE ONLY IN PART—see **APPEAL**, 14.

CONTINUANCE WITHIN DISCRETION OF COURT—see **CONTINUANCE**, 1.

COSTS ON MOTIONS—see **COSTS**, 2.

PRACTICE ON APPEAL AS TO PRELIMINARY INJUNCTION—see **INJUNCTION**, 1.

ENFORCEMENT OF RULES OF COURT—see **RULES OF COURT**, 1.

ADDITIONS TO JUDGE'S CERTIFICATE TO STATEMENT—see **STATEMENT**, 2.

TRANSFER OF ACTIONS TO UNITED STATES COURTS—see **TRANSFER**, 1.

PRACTICE AS TO CHANGE OF PLACE OF TRIAL—see **VENUE**, 1, 3, 4, 5, 6.

PRACTICE ACT.

1. **PRACTICE ACT, SEC. 160—DEVELOPMENT OF MINES—EVIDENCE.** There is nothing in Sec. 160 of the Practice Act, which authorizes a delay of proceedings in mining cases for the purpose of allowing developments to be made, to show that it was intended to make actual developments the only or even the best evidence admissible. *Silver Mining Company v. Fall*, 116.

SEC. 225—AUTHENTICATION OF STATEMENT ON NEW TRIAL—see **APPEAL**, 1.

- SEC. 332—STATEMENT ON APPEAL FROM ORDER—see APPEAL, 11.
- SEC. 330—ORDER REQUIRING BOND NOT APPEALABLE—see APPEAL, 13.
- SEC. 478—COSTS WHERE RECOVERY LESS THAN \$300—see COSTS, 1.
- SEC. 427—ORAL RESULT OF EXAMINATION OF LONG ACCOUNTS—see EVIDENCE, 19.
- SEC. 191—SPECIFICATION OF OBJECTIONS—see EXCEPTION, 2.
- SEC. 210—SATISFACTION OF JUDGMENT—see JUDGMENT, 2.
- SEC. 202—JUDGMENT IN GOLD COIN FOR DAMAGES—see JUDGMENT, 5.
- SEC. 197—AS TO NOTICE OF DECISION AFFECTING TIME TO MOVE FOR NEW TRIAL—see NEW TRIAL, 3.
- SEC. 104—PARTIES TO ACTION ON REPLEVIN BOND—see PARTIES, 1.
- SEC. 12—AS TO JOINDER OF PARTIES IN INTEREST—see PARTIES, 2.
- SEC. 179—JUDGMENT IN REPLEVIN—see REPLEVIN, 2.
- SECS. 226-227—RE-SALE BY SHERIFF—see SHERIFF, 1.
- SECS. 197 and 335—JUDGE'S CERTIFICATE TO STATEMENT—see STATEMENT, 1.
- SEC. 29—SERVICE OF SUMMONS ON CALIFORNIA CORPORATION—see SUMMONS, 1, 2.
- SEC. 20—CHANGE OF PLACE OF TRIAL—see VENUE, 1.

PRESUMPTIONS.

- SHOWING OF ALLEGED IMMATERIALITY OF ERROR IN CRIMINAL CASES MUST BE CONCLUSIVE—see APPEAL, 18.
- BANKRUPT PLEADING DISCHARGE PRESUMED TO INSIST ON DISCHARGE—see BANKRUPTCY, 1.
- PRESUMPTION OF AUTHORITY TO AFFIX SEAL TO DEED OF CORPORATION—see CORPORATIONS, 5.
- PRESUMPTIONS AS TO POWERS OF COUNTY COMMISSIONERS—see COUNTY COMMISSIONERS, 2.
- NO PRESUMPTION OF LOADING OF PISTOL FROM ATTEMPTED USE—see DEADLY WEAPON, 2.
- PRESUMPTION OF CLAIM TO ENTIRE TRACT BY ENTRY UNDER DEED—see ENTRY, 1.

DIRECT PROOF AS OPPOSED TO PRESUMPTION—see EVIDENCE, 1.

PRESUMPTION THAT JURIES FOLLOW INSTRUCTIONS—see JURY, 3.

INTENDMENTS IN FAVOR OF COMPLAINT AFTER ORDER BASED UPON IT—see ORDER, 8.

INTENDMENTS IN FAVOR OF COMPLAINT AFTER JUDGMENT—see PLEADING, 5.

PRESUMPTION OF CONSTITUTIONALITY OF STATUTES—see STATUTES, 2.

PRESUMPTION WHERE TRANSCRIPT DOES NOT CONTAIN ALL THE EVIDENCE—see TRANSCRIPT, 1.

PRESUMPTION AGAINST WAIVER OF ERRORS—see WAIVER, 1.

PROMISSORY NOTES.

1. COMPLAINT BY HUSBAND ON NOTE GIVEN TO WIFE. Where a complaint by a husband on a note and mortgage given to his wife, alleged that he was the owner and holder of the note and mortgage, and in another part that the note and mortgage were the common property of himself and wife: *Held*, that though there was an apparent, there was no real contradiction; that the allegation of common property was nothing more than an explanation of the character of his ownership, and that a demurrer for ambiguity would not lie. *Crow v. Van Sickle*, 146.
2. FORGERY OF CHECK ON "AGENCY OF BANK OF CALIFORNIA." In a prosecution for forging a check drawn on the "Agency of the Bank of California," where it was both alleged and proved that the bank was a corporation under the laws of California, and that it had an agency in Virginia City, whose business it was to receive deposits and pay out money on the checks of depositors: *Held*, that an objection that the check presented no sensible drawee was invalid. *State v. Cleveland*, 181.

FORGERY OF CHECK PAYABLE TO "SAPPHIRE MILL OR BEARER"—see CRIMINAL LAW, 9.

NOTE PAYABLE IN GOLD COIN OR ITS EQUIVALENT—see CURRENCY, 2.

PROTEST.

1. PROTESTING BY WORDS AND CONSENTING BY ACTS. A protest by a person against receiving payment in treasury notes, at the same time that he does receive them, places him in no better position than if nothing had been said, for the reason that, though he protests with his tongue, he consents by his acts. *Gilman v. Douglas County*, 27.

PURCHASER.

MORTGAGEE FOR PRE-EXISTENT DEBT WHEN REGARDED AS BONA FIDE PURCHASER FOR VALUE—see MORTGAGE, 1.

PURCHASE AT SHERIFF'S SALE BY JUDGMENT CREDITOR—see SHERIFF, 1, 2.

RAILROADS.

1. VIRGINIA AND CARSON CITY RAILROAD—LYON COUNTY RAILROAD BONDS. Where a statute provided for the issuance of the bonds of Lyon County to the Virginia and Truckee Railroad Company, upon its building a first-class railroad from Virginia City to Carson City, running within twelve hundred feet west of Trench's mill in Silver City, (Stats. 1869, 62); *Held*, that the building of a first-class railroad between the cities named, but running twenty-four hundred feet west of Trench's mill, though a branch was built up to within four hundred feet, was not a compliance with the condition of the statute, and would not authorize the issuance of the bonds. *Virginia and Truckee R. R. Co. v. Lyon County Commissioners*, 68.

RECEIVER.

ORDER APPOINTING RECEIVER NOT APPEALABLE—see APPEAL, 13.

RECORD.

1. RECORD OF DEED, CONSTRUCTIVE NOTICE OF CONTENTS TO WHOM. The record of a deed only imparts notice of the contents thereof to subsequent purchasers and mortgagees, etc., and not to persons who claim by entirely independent right or title. *Sharon v. Minnock*, 377.

EFFECT OF FAILURE TO RECORD DECLARATION OF TRUST—see MORTGAGE, 1.

RENT.

1. ACTION FOR RENT ON LEASE NOT SIGNED BY TENANT. Where a tenant holds premises under a lease not signed by him, although a technical action of covenant might not be supported, an action in the nature of assumpsit for rent can certainly be maintained. *Fitton v. Inhabitants of Hamilton City*, 196.

RENT OF PUBLIC BUILDINGS LEASED TO STATE—see LEASE, 3.

REPLEVIN.

1. REQUISITES OF VERDICT IN REPLEVIN. Where, in replevin, it appeared that a portion of the property had been delivered to plaintiff, and defendant claimed a return, and there was a general verdict for plaintiff in a sum certain: *Held*,

that the verdict was erroneous, for the reason that no such peculiar judgment or execution as are provided for by statute in such cases could be rendered or issued thereon. *Carson v. Applegarth*, 187.

2. REPLEVIN VERDICTS, JUDGMENTS AND EXECUTIONS. In a replevin case, where the property has not been delivered to plaintiff, a verdict and judgment in his favor are required by the statute, (Practice Act, Secs. 179 and 202) to be in the alternative, and so also is the execution. *Carson v. Applegarth*, 187.
3. REPLEVIN—OPTION TO TAKE PROPERTY OR VALUE. In a replevin suit, where the verdict is for plaintiff, and he has not already received the property, defendant has a right to deliver it instead of money, and in such case the option to take the property or its value does not rest with plaintiff. *Carson v. Applegarth*, 187.
4. QUESTION INVOLVED ON REPLEVIN AGAINST A UNITED STATES MARSHAL. Where a replevin suit was commenced in a State court against a marshal for goods seized by him under attachment process from a United States court: *Held*, that the State court could not extend its inquiry beyond the question as to whether the Federal process was valid; and if so, that the question of title to the goods was irrelevant. *Feusier v. Lammon*, 209.
5. JUDGMENT IN REPLEVIN FOR UNITED STATES MARSHAL. In a replevin suit in a State court against a marshal for goods seized under a writ of attachment from a United States court, there is jurisdiction (if the property has been taken from the marshal) to render judgment in his favor for a return of the property or its value. *Feusier v. Lammon*, 209.

PARTIES PLAINTIFF IN SUIT ON REPLEVIN BOND—see PARTIES, 1, 2.

SHERIFF NOT INTERESTED IN REPLEVIN BOND—see SHERIFF, 3.

RIGHT OF WAY.

RIGHT OF WAY OVER PUBLIC LAND WITHOUT COMPENSATION—see EMINENT DOMAIN, 1.

ROADS.

1. TOLL ON CARSON CITY AND EMPIRE MACADAMIZED ROAD. Where a toll road franchise between Carson City and Empire, granted in 1864, was by judicial action in May, 1865, declared forfeited; and in June, 1865, the holder sought to acquire the right to collect tolls on it by a compliance with the general act of March, 1865, relating to toll roads, (Stats. 1864—5, 264): *Held*, that as the statute provided that no toll road constructed under its provisions, or otherwise, should "interfere with any road or highway in general use by the traveling public," no right could, in that manner, be acquired to collect such tolls. *Stat ex rel. Buckley v. Curry*, 75.

2. **EFFECT OF FORFEITURE OF TOLL ROAD FRANCHISE.** Under the provisions of section seven of the act concerning toll roads, (Stats. 1864-5, 254) where the franchise of a toll road, previously granted, became or was judicially declared forfeited: *Held*, that the road became the property of the county, and that, if the county commissioners took no action for the collection of tolls, it became a free highway. *State ex rel. Buckley v. Curry*, 75.

RULES OF COURT.

1. **ENFORCEMENT OF RULES OF COURT.** Courts have power to adopt rules not in conflict with law; and when they have done so and the rules are reasonable, an appellate court will not interfere with their enforcement. *Caples v. Central Pacific R. R. Co.*, 265.
2. **NOTICE OF MOTION TO RETAX COSTS.** Where a rule of court required notice of motion to retax costs to be served within two days after the filing of the cost bill: *Held*, that it was no error to refuse to hear a motion to retax costs, when such notice had not been served. *Caples v. Central Pacific R. R. Co.*, 265.
3. **DISCRETION OF COURTS AS TO THEIR RULES.** Courts have a reasonable discretion in allowing or not allowing the requirements of their rules to be waived. *Caples v. Central Pacific R. R. Co.*, 265.

SALARIES.

RIGHTS OF COUNTY OFFICERS TO COUNTY REVENUE FOR SALARIES—see **OFFICERS**, 1.

SALE.

1. **SALE—EVIDENCE OF CONTINUED CHANGE OF POSSESSION.** In an action against an officer to recover personal property seized by him on execution against a third person, from whom plaintiff claimed to have purchased and received possession of it previous to the seizure, and in which the question of continued change of possession became involved: *Held*, that it was competent for the plaintiff to show his acts of ownership after the sale, and that any exclusion of such testimony was error. *Conway v. Edwards*, 190.
2. **SALE—CHANGE OF POSSESSION.** Where it appeared that Lewis purchased of Waddell certain mules and harness, giving therefor his two promissory notes for \$500 each, and crediting \$100 on an account; that he immediately took possession of them, and freighted with them for three or four weeks, driving them himself; that he then contracted to haul for Waddell, who was to pay therefor by the day, and also all the expenses of the team; that Lewis had paid one of his notes; that the team continued in Lewis' possession, though stabled in a barn owned by Waddell: *Held*, that the evidence was sufficient to establish an actual and continued change of possession, as against a claim of Waddell's creditors. *Lewis v. Wilcox*, 215.

3. **SALE—DELIVERY AND CHANGE OF POSSESSION.** Where Hanchett sold a team to Clute, who took and retained possession for one day and then allowed Hanchett to take it back and keep and use it six weeks, Clute meanwhile paying the expenses and receiving the earnings; and then Clute resumed possession and put it on a ranch; and the next day suits were commenced against Hanchett and the team attached as his property: *Held*, that the sale and delivery was valid as against the attaching creditors. *Clute v. Steele*, 335.
4. **STATUTE OF FRAUDS—STATUS OF CREDITOR TO ATTACK SALE OF GOODS FOR WANT OF DELIVERY.** A mere creditor at large is not in a position to attack a sale of goods by his debtor on the ground of want of delivery and change of possession under the statute of frauds: before he can do so he must acquire a lien by attachment or otherwise. *Clute v. Steele*, 335.

LEASE OF PREMISES AS EVIDENCE OF SALE OF GOODS—see EVIDENCE, 13.

DECLARATIONS OF VENDOR AFTER SALE—see EVIDENCE, 15.

EXECUTION SALE—EFFECT OF STRIKING OFF TO JUDGMENT CREDITOR—see EXECUTION, 1.

SHERIFF'S SALES—see SHERIFF, 1, 2.

PROOF OF SALE—see STATUTE OF FRAUDS, 1.

DELIVERY AFTER SALE AND BEFORE ATTACHMENT—see STATUTE OF FRAUDS, 2.

SATISFACTION.

MERE STRIKING OFF TO JUDGMENT CREDITOR AT SALE NOT SATISFACTION OF EXECUTION—see EXECUTION, 2.

WHEN JUDGMENT CREDITOR MAY BE ORDERED TO SATISFY JUDGMENT—see JUDGMENT, 2.

SEAL.

DEED OF CORPORATION—PRESUMPTION OF AUTHORITY TO AFFIX SEAL—see CORPORATIONS, 5.

SERVICE.

(See SUMMONS.)

SHERIFF.

1. **PURCHASE WITHOUT PAY BY JUDGMENT CREDITOR AT EXECUTION SALE.** When a judgment creditor, to whom property is struck off at execution sale, refuses to consummate his purchase, there should be a re-sale under the provisions of Secs. 226 and 227 of the Practice Act, the same as in the case of any other purchaser. *Sweeney v. Hawthorne*, 129.

2. **PAYMENT ON PURCHASE BY JUDGMENT CREDITOR.** Where the judgment creditor is the purchaser at execution sale, it does not follow that he need not pay any money—the officer may require payment when fees are due, or to become due to him, and in default of payment may re-sell. *Sweeney v. Hawthorne*, 129.
3. **SHERIFF NOT INTERESTED IN REPLEVIN BOND.** Though Sec. 104 of the Practice Act requires the undertaking given on return of property replevied to be delivered to the sheriff, the officer has no interest in it, and is not a proper party plaintiff in a suit on it. *McBeth v. Van Sickle*, 134.
4. **SEIZURE BY SHERIFF OF GOODS ATTACHED BY CONSTABLE.** Where a sheriff seized and sold on execution out of a district court goods which were held by a constable on attachment out of a justice's court: *Held*, that the sheriff, though he was responsible to the constable, was not so to the creditor in the attachment suit. *Foulks v. Pegg*, 136.

SPECIAL PROPERTY OF OFFICER IN PROPERTY ATTACHED—see ATTACHMENT, 1.

LIABILITY OF ATTACHING OFFICER TO ATTACHMENT CREDITOR—see ATTACHMENT, 2.

STATE.

NO DOCKET FEE IN ACTION BY STATE—see COSTS, 3.

ADVANCES TO STATE, WHAT—see DEFINITIONS, 1.

JURISDICTION OF STATE COURT AS TO PROPERTY SEIZED UNDER FEDERAL PROCESS—see JURISDICTION, 5.

RENT OF PUBLIC BUILDINGS LEASED TO STATE—see LEASE, 3.

STATE APPROPRIATION FOR PROSECUTING INFRACTIONS OF REVENUE LAWS—see TAXES, 3.

STATEMENT.

1. **JUDGE'S CERTIFICATE TO STATEMENT ON APPEAL.** The Practice Act (Secs. 197 and 335) does not contemplate that the judge shall certify that a statement on appeal contains all the evidence, but simply that it has been allowed by him and is correct. *Caples v. Central Pacific R. R. Co.*, 265.
2. **ADDITIONS TO JUDGE'S CERTIFICATE TO STATEMENT.** A judge's certificate to statement on motion for new trial and appeal that the record contains all the evidence, will not be allowed to be added after the appeal has been perfected and the transcript become a record of the appellate court. *Caples v. Central Pacific R. R. Co.*, 265.

WANT OF AUTHENTICATION OF STATEMENT ON NEW TRIAL—see APPEAL, 1.

ISSUES ON APPEAL ON NEW TRIAL STATEMENT—see APPEAL, 2.

ERROR IN JUDGMENT ROLL MAY BE CORRECTED WITHOUT STATEMENT—*see* APPEAL, 5.

STATEMENT ON APPEAL FROM NEW TRIAL ORDER—*see* APPEAL, 12.

AUTHENTICATION OF STATEMENT ON NEW TRIAL—*see* NEW TRIAL, 1.

NAMING PAPER "STATEMENT" NOT INDORSING IT AS CORRECTLY SUCH—*see* STIPULATION, 1.

WAIVER AS TO TIME TO MAKE STATEMENT ON APPEAL—*see* WAIVER, 4.

STATUTES.

1. TITLE OF STATUTE WHAT TO EXPRESS. It is only necessary, under the constitutional provision as to the subject-matter and title of statutes, (Const., Art. IV, Sec. 17) to express in the title the principal subject embodied in the law, while the matters properly connected therewith are not required to be mentioned. *Humboldt County v. Churchill County Commissioners*, 30.
2. PRESUMPTION OF CONSTITUTIONALITY OF STATUTES. No statute will be annulled by a court on the ground of unconstitutionality unless it be clearly in conflict with the constitution. *Humboldt County v. Churchill County Commissioners*, 30.
3. JUDICIAL POWER AS TO STATUTES. No court has a right to annul or set aside a statute except upon constitutional grounds, and no inquiry can be made as to any alleged misunderstanding between legislators respecting its adoption, or even fraud in procuring its passage. *Humboldt County v. Churchill County Commissioners*, 30.
4. STATUTES THE EXPRESSION OF FREE LEGISLATIVE WILL. A statute must be taken by courts to be the expression of the free will and wish of the legislature, whatever may have been the means employed to secure its adoption, and irrespective of any agreement or understanding had between members. *Humboldt County v. Churchill County Commissioners*, 30.
5. CONSTRUCTION OF MARRIAGE STATUTE. The proviso in the marriage act to the effect that the issue of a marriage of persons not of lawful age shall not be illegitimate, (Stats. 1867, 88) refers to the issue of marriages of persons under eighteen years in males and under sixteen in females. *Fitzpatrick v. Fitzpatrick*, 63.
6. IMPRACTICABLE CONDITION PRESCRIBED BY STATUTE. Where a statute prescribed that bonds should be issued to a railroad if it should pass a certain point: *Held*, that to entitle the railroad to the bonds it must pass such point, notwithstanding passing such point might prove to be impracticable. *Virginia and Truckee R. R. Co. v. Lyon County Commissioners*, 68.

7. **CONFLICT OF STATUTES.** The statute relating to the removal of county seats required an election to be held within *fifty* days after the order therefor (Statutes of 1867, 78). On the other hand, the registry law of 1869 (Statutes of 1869, 140) allowed registration for forty days prior to closing the register, which should close ten days prior to the day of election: *Held*, that though the latter law might render it impossible to hold an election within fifty days, still the former law was too clear and plain in its terms to mean that the fifty day period could be extended. *State ex rel. Hess v. Washoe County Commissioners*, 104.
8. **STATUTE RELATING TO TENANTS HOLDING OVER.** Where a tenant under a lease for a term less than a year holds over with the consent of his landlord, a new tenancy for a like term is created by virtue of the statute. (Stats. 1864-5, 264.) *Pitton v. Inhabitants of Hamilton City*, 196.
9. **CONSTRUCTION OF STATUTE CONTAINING FORM OF INDICTMENT.** The section of the criminal statute giving the form of an indictment and omitting the venue therefrom (Stats. 1867, 126) is controlled by the next section, which requires a statement of all essential facts. *State v. Chamberlain*, 257.

STATUTES AS TO DEPUTY ASSESSORS (STATS. 1864, 143; 1864-5, 345)—see ASSESSOR, 2.

STATUTE MAKING LINCOLN COUNTY NINTH JUDICIAL DISTRICT (STATS. 1867, 129) CONSTITUTIONAL—see CONSTITUTION, 2.

STATUTE MAKING CHURCHILL PAY HUMBOLDT COUNTY \$3,000 A YEAR FOR FIVE YEARS (STATS. 1869, 88) CONSTRUED—see CONSTRUCTION, 1.

SUBSTANTIAL COMPLIANCE WITH CONDITION PRESCRIBED BY STATUTE—see CONSTRUCTION, 3.

PRINCIPLES OF STATUTORY CONSTRUCTION—see CONSTRUCTION, 4, 5, 6, 7.

CREATION OF LINCOLN COUNTY (STATS. 1866, 131)—see COUNTIES, 1.

STATUTE TO REMOVE COUNTY SEAT (STATS. 1867, 78)—see COUNTY SEAT, 1, 2.

LEGISLATIVE POWER AS TO GIVING CERTAIN COUNTY CLAIMS PREFERENCE—see LEGISLATURE, 1.

STATUTE AS TO DISTRICT JUDGE'S TERM IN LINCOLN COUNTY—see OFFICERS, 2.

STATUTE IN REGARD TO TOLL ROADS—see ROADS, 1.

STATUTE OF FRAUDS.

1. **STATUTE OF FRAUDS—PROOF OF SALE.** To show a continued change of possession, such as is necessary to support a sale of personal property under the statute of frauds, nothing generally can have a more direct tendency than the control and management of the property, or acts of ownership exercised over it by the vendee. *Conway v. Edwards*, 190.

2. **DELIVERY AFTER SALE AND BEFORE ATTACHMENT.** Where goods were sold and the vendee took possession at a time subsequent to the sale but before the levy of an attachment: *Held*, that the delivery before the attachment satisfied the statute of frauds and validated the sale. *Chute v. Steele*, 335.

CHANGE OF POSSESSION, WHAT—see SALE, 2, 3, 4.

STIPULATION.

1. **NAMING A PAPER NOT INDORSING ITS CORRECTNESS AS SUCH.** A stipulation reciting the papers by name which the transcript on appeal should contain, and among others the "Statement on New Trial," is not a waiver of objections that the paper purporting to be such statement is not properly authenticated, and therefore not a statement. *White v. White*, 20.

TRANSFER OF ACTION BY STIPULATION—see VENUE, 6.

STREETS.

LIABILITY OF VIRGINIA CITY AS TO CARE OF STREETS—see CORPORATIONS, 3.

VIRGINIA CITY CHARTER AS TO OPENING AND REPAIRING STREETS—see VIRGINIA CITY, 1, 2, 3.

SUMMONS.

1. **SERVICE OF SUMMONS UPON CALIFORNIA COMPANY.** Service of summons upon a California corporation, made in accordance with Sec. 29 of the Practice Act, is valid. *Coples v. Central Pacific R. R. Co.*, 265.
2. **SERVICE OF SUMMONS AFTER INUFFICIENT ATTEMPTED SERVICE.** Where an attempted service of summons upon a California corporation was made in this State, and a subsequent service in California, under the provisions of Sec. 29 of the Practice Act: *Held*, that it made no difference whether an order refusing to quash the first service was correct or not, it appearing that the second service was good, and no prejudice done. *Coples v. Central Pacific R. R. Co.*, 265.

SURETIES.

1. **LIABILITY OF SURETIES ON BOND OF DE FACTO OFFICER.** Where a State treasurer, reelected in 1866, accepted a new commission and took a new oath, and continued to discharge the duties of the office, but failed to file a new official bond within the time prescribed by law: *Held*, that he was an officer *de facto* and holding as of the new term; and that the sureties on the new bond afterwards filed were estopped from denying that he was holding as of the new term *de jure*. *State v. Rhoades*, 352.

LIABILITY OF SURETIES OF DEPUTY ASSESSOR—see ASSESSOR, 1.

TERM OF LIABILITY ON BOND OF DEPUTY ASSESSOR—see BONDS, 1.

TAXES.

1. "SUBSEQUENT TAX ASSESSMENT" OF VIRGINIA & TRUCKEE RAILROAD COMPANY. Where, under the provisions of the supplemental revenue act of 1867, (Stats. 1867, 111) the Virginia and Truckee Railroad Company applied to the county commissioners of Ormsby County to have the "subsequent assessment roll" for 1869, as to its property, equalized; and the commissioners thereupon ordered the entire subsequent assessment roll to be stricken out and remitted: *Held*, that they acted beyond their powers, and that their order was void. *State ex rel. Swift v. Ormsby County Commissioners*, 95.
2. EXTENT OF RELIEF AS AGAINST SUBSEQUENT ASSESSMENTS. Under the supplemental revenue act of 1867, (Stats. 1867, 111) allowing every person feeling aggrieved by a supplemental assessment roll to appear before the county commissioners and apply to have such assessment equalized, modified or discharged, and authorizing the commissioners to hold a meeting to hear and finally determine the matter: *Held*, that the commissioners had no power to interfere with the subsequent assessment roll, except upon application of some person feeling aggrieved, and even then, in granting relief, not to go beyond the application made. *State ex rel. Swift v. Ormsby County Commissioners*, 95.
3. FEES FOR PROSECUTING DELINQUENT STATE TREASURER. Where a sheriff had a bill for fees in a suit by the State against the estate of a delinquent State treasurer and the sureties on his official bond: *Held*, that he could not claim payment out of a State appropriation "for prosecuting delinquents for infraction of the revenue laws," and that the controller properly refused to issue his warrant therefor. *Swift v. Doron*, 125.
4. TAX SALES OF PERSONAL PROPERTY—INJUNCTION. Where a complaint to restrain a county assessor from selling certain personal property for taxes alleged that he would sell unless restrained, and thereby damage plaintiff in a certain amount of money: *Held*, that as the amount of damages was exactly stated and there was no showing that a judgment therefor could not be collected, there was no case for a restraining order, injunction or other equitable relief. *Conley v. Chedie*, 222.

TENDER.

STOCK BROKERAGE—WAIVER OF TENDER—see *BROKER*, 1.

TERM.

TERM OF DEPUTY COUNTY ASSESSOR—see *ASSESSOR*, 1.

TERMS OF DISTRICT JUDGES—see *ELECTIONS*, 1.

TERM OF LEASE CREATED BY HOLDING OVER—see *LEASE*, 2.

SURRENDER OF FIRST TERM BY OFFICER RE-ELECTED—see *OFFICERS*, 3.

TIME.

- TIME OF ELECTION TO REMOVE COUNTY SEAT—see COUNTY SEAT, 2.
- TIME OF ELECTION FOR DISTRICT JUDGES—see ELECTIONS, 1.
- TIME TO MOVE FOR NEW TRIAL—see NEW TRIAL, 3.
- WAIVER AS TO TIME TO MAKE STATEMENT ON APPEAL—see WAIVER, 4.

TOLLS.

(See ROADS.)

TRANSCRIPT.

1. TRANSCRIPT NOT CONTAINING ALL THE EVIDENCE. An objection that the evidence is insufficient to support the judgment is unavailable on appeal, if the transcript does not purport to contain all the evidence on the point; it requiring an affirmative showing to rebut the presumption that all facts necessary to support the judgment were sufficiently proved. *Caples v. Central Pacific R. R. Co.*, 265.
- TRANSCRIPT CONTAINING NOTHING TO BE REVIEWED—see APPEAL, 6.
- DISMISSAL OF APPEAL WHERE NOTHING BROUGHT UP FOR REVIEW—see APPEAL, 7.
- POINTS NOT COVERED BY TRANSCRIPT NOT CONSIDERED—see APPEAL, 17.
- ADDITIONS TO JUDGE'S CERTIFICATE TO STATEMENT—see STATEMENT, 2.

TRANSFER.

1. TRANSFER OF ACTIONS TO UNITED STATES COURTS. Where a motion was made to transfer a suit brought against a citizen of California to the United States Court on the ground that the plaintiff was a citizen of this State; and on counter affidavits showing plaintiff to be a citizen of Missouri, the motion was denied: *Held*, no error. *Caples v. Central Pacific R. R. Co.*, 265.
- TRANSFER OF ACTION BY STIPULATION—see VENUE, 6.

TREASURER.

1. TREASURER'S POWERS AS TO SUBSEQUENT TAX ASSESSMENTS. The evident object of the supplemental revenue act of 1867 (Stats. 1867, 111) was to make all assessments made by the treasurer final, or at least, exempt them from any

supervision by the county commissioners, except in cases where application might be made by a person feeling aggrieved. *State ex rel. Swift v. Ormsby County Commissioners*, 95.

2. **DELINQUENCY OF STATE TREASURER NOT INFRACTION OF REVENUE LAWS.** The delinquency of the State treasurer in failing to safely keep the money of the State, cannot be said to be an infraction of the "revenue laws," specially so called. *Swift v. Doron*, 125.

TRUST.

MORTGAGE FOR PRE-EXISTENT DEBT WHEN REGARDED AS BONA FIDE PURCHASER FOR VALUE AS AGAINST UNRECORDED TRUST—see MORTGAGE, 1.

POSSESSION OF LAND AFTER DEED NOT NOTICE OF TRUST IN IT—see POSSESSION, 1.

UNITED STATES.

RIGHT OF WAY OVER PUBLIC LANDS GIVEN BY UNITED STATES—see EMINENT DOMAIN, 1.

JURISDICTION OF FEDERAL JUDICIARY AS TO FEDERAL POWERS—see JURISDICTION, 4.

JURISDICTION OF STATE COURTS AS TO PROPERTY SEIZED UNDER FEDERAL PROCESS—see JURISDICTION, 5.

TRANSFER OF ACTIONS TO UNITED STATES COURTS—see TRANSFER, 1.

VENUE.

1. **DISCRETION AS TO CHANGE OF PLACE OF TRIAL.** As a general rule, the matter of change of place of trial is within the discretion of the court; but when the motion to change is made on the ground of the residence of defendant, (Practice Act, Sec. 20) there is no room for the exercise of discretion. *Williams v. Keller*, 141.
2. **DEFENDANT'S RIGHT OF TRIAL AT HIS RESIDENCE.** A defendant who comes within the purview of Sec. 20 of the Practice Act is entitled, as a matter of right, to have an action against him tried in the county of his residence; the statute is peremptory. *Williams v. Keller*, 141.
3. **"MOTION TO RETAIN PLACE OF TRIAL."** There cannot properly be any such practiced as an affirmative motion to retain a cause for trial; everything usually called so is only matter of defense to a motion for a change. *Williams v. Keller*, 141.
4. **CONTESTING DEFENSE NO WAIVER OF RIGHT TO CHANGE OF PLACE OF TRIAL.** Where a defendant in a proper case moves to change the place of trial to the

county of his residence, he has an absolute right to such change; and the mere fact that he files counter affidavits and contests an effort to retain the cause on the ground of convenience of witnesses, will not amount to any waiver of his right. *Williams v. Keller*, 141.

5. **EFFECT OF MOTION TO CHANGE PLACE OF TRIAL FOR RESIDENCE.** Where a defendant in a proper case moves to change the place of trial to the county of his residence, the court is by force of his motion ousted of all jurisdiction in the cause, except to decide upon the proposition of his residence at the time of the commencement of the action, and to transfer the case. *Williams v. Keller*, 141.
6. **TRANSFER OF ACTION BY STIPULATION.** Where a cause was transferred from one judicial district to another on a stipulation, which provided that if a trial should not be had in the new district by a certain time, the cause should be transferred back to the original district, and it was so transferred back: *Held* no error. *Lyon County v. Washoe County*, 241

OMISSION OF VENUE IN INDICTMENT NOT AMENDABLE—see AMENDMENT, 1.

VENUE IN TRIAL OF ACCESSORY—see CRIMINAL LAW, 14.

VENUE MATERIAL IN INDICTMENTS—see INDICTMENT, 2.

CONVENIENCE OF WITNESSES AS AFFECTING PLACE OF TRIAL—see PRACTICE, 2.

VERDICT.

1. **MOTION FOR JUDGMENT "NON OBSTANTE VEREDICTO."** A motion for judgment *non obstante veredicto*, if proper at all under the Practice Act, can certainly not be made by defendant. *Brown & Eagar v. Lillie*, 177.
2. **NO LEGAL JUDGMENT ON VERDICT IRRESPONSIVE TO PLEADINGS.** If a verdict is absolutely defective under the pleadings, no legal judgment can be entered thereon. *Brown & Eagar v. Lillie*, 177.

"TREATING" OF JURY AVOIDS VERDICT—see JURY, 4, 5.

REQUISITES OF VERDICT IN REPLEVIN—see REPLEVIN, 1, 2.

VIRGINIA CITY.

1. **VIRGINIA CITY CHARTER — OPENING AND REPAIRING STREETS.** The provision of the charter of Virginia City, that the "board of aldermen shall have power" to open streets, improve them, and keep sidewalks in repair, gives a permissive power only, and does not impose the duty upon the city to do these things. *McDonough v. Mayor and Aldermen of Virginia City*, 90.
2. **VIRGINIA CITY NOT OBLIGED TO REPAIR STREETS.** The charter of Virginia City in express terms leaves the matter of repairing the streets discretionary with

the authorities, as it does the opening of them in the first instance; and consequently the city cannot be held liable for a refusal to repair a street after it has once been properly opened and put in good condition. *McDonough v. Mayor and Aldermen of Virginia City*, 90.

3. VIRGINIA CITY, WHEN RESPONSIBLE FOR DEFECTS IN STREETS. Though Virginia City, under its charter, is not obliged to open a street, nor to repair one after it is opened, yet if a street, when opened, is left in such a defective condition that injuries result therefrom to persons exercising proper care, the city is liable therefor. *McDonough v. Mayor and Aldermen of Virginia City*, 90.

WAIVER.

1. PRESUMPTION AGAINST WAIVER OF ERRORS. It is always the duty of the person wishing to avoid the consequences of error in legal proceedings, upon the ground of waiver by the opposite party, to show such waiver, and not of the person insisting on the error to establish that it was not waived. *White v. White*, 20.
2. WAIVER NOT PRESUMED EXCEPT IN CLEAR CASE. The legal presumption of a waiver of any right by a litigant will not be drawn except in a clear case, and especially not when to allow such a presumption would be to deprive a party of his day in court. *Williams v. Keller*, 141.
3. WAIVER OF RIGHT TO MOVE FOR A NEW TRIAL. Where a party in a case tried by the court appealed from a judgment without the preliminary step of moving for a new trial: *Held*, that he thereby waived such motion, and could not afterwards take advantage of the fact that he had received no written notice of the rendering of the decision of the judge. *Corbett v. Swift*, 194.
4. WAIVER OF WAIVER—TIME TO MAKE STATEMENT ON APPEAL. A failure to make a statement on appeal within twenty days after the entry of judgment is equivalent to a waiver of such statement; but such waiver may be itself waived; and a stipulation that the statement on new trial shall be also the statement on appeal, though made more than twenty days after judgment, is such a waiver. *Johnson v. Wells, Fargo & Co.*, 224.
5. WAIVER OF OBJECTIONS TO AFFIDAVITS FOR CONTINUANCE. Where in a criminal case, on motion for continuance on the ground of absence of witnesses, no objection was made that the affidavits did not set forth the materiality of their testimony; but it appeared that the court assumed its materiality: *Held*, that it would be unfair to allow the objection to be made for the first time in the Supreme Court. *State v. Chapman*, 320.
6. FAILURE TO OBJECT TO WANT OF PROOF WHEN WAIVER OF PROOF. Where a deed purporting to be that of a corporation was permitted to be introduced in evidence, without any objection, at the time, that the seal had not been proved, nor any authority to affix it shown: *Held*, a waiver of such proof. *Sharon v. Minnock*, 377.

WAIVER OF PROOF OF FACT PLEADED ON OTHER SIDE—see BANKRUPTCY, 1.

STOCK BROKERAGE—WAIVER OF DELIVERY OR TENDER—see BROKER, 1.

WAIVER OF PERFORMANCE OF CONTRACT BY WAY OF ESTOPPEL—see ESTOPPEL, 1.

MOTION FOR NEW TRIAL—WAIVER OF NOTICE OF DECISION—see NEW TRIAL, 2.

NAMING A PAPER "STATEMENT" NOT A WAIVER OF OBJECTIONS TO IT—see STIPULATION, 1.

CONTESTING DEFENSE NO WAIVER OF RIGHT TO CHANGE VENUE—see VENUE, 4.

WARRANTS.

RIGHT UNDER WARRANT TO MONEY IN TREASURY—see COUNTY FUNDS, 1.

WASTE.

SUFFICIENCY OF COMPLAINT FOR INJUNCTION TO STAY WASTE—see PLEADING, 4.

WATER RIGHTS.

1. ACT OF CONGRESS AS TO WATER RIGHTS OVER PUBLIC LAND. The act of Congress (14 Statutes at Large, 253, Sec. 9) gives—as clearly as acts of Congress usually express their objects—a right of way over public lands to all who may desire to construct ditches or canals for mining or agricultural purposes. *Hobart v. Ford*, 77.
2. WATER RIGHTS—OBSTRUCTIONS HARMLESS WHEN ERECTED. A dam erected on a stream in a manner in no wise injurious or prejudicial at the time of its erection to a mill above, but which, by reason of circumstances that could not have been anticipated happening subsequently and operating in connection with it, causes the water to flow back upon the mill, is not such an obstruction as to authorize its abatement or justify a recovery of damages against the person building it. *Proctor v. Jennings*, 83.
3. RIGHTS OF SUBSEQUENT APPROPRIATORS OF WATER. A person appropriating a water right on a stream already partly appropriated acquires a right to the surplus or residuum he appropriates; and those who acquired prior rights, whether above or below him on the stream, can in no way change or extend their use of water to his prejudice, but are limited to the rights enjoyed by them when he secured his. *Proctor v. Jennings*, 83.
4. FORTUITOUS INJURIES TO WATER RIGHTS. Where a dam was erected on a stream below another's mill, and so as not at the time to interfere with it, but subsequently, on account of a new process of mining going into operation on the

stream above, extraordinary quantities of sediment were deposited so as with the dam to interfere with the mill above: *Held*, that as the injuries resulting to the mill were not occasioned immediately by the dam, but by unforeseen and fortuitous circumstances happening afterward, though acting in connection with it, the owner of the dam was not responsible. *Proctor v. Jennings*, 83.

5. **MEASUREMENT OF WATER APPROPRIATION.** It seems that the quantity of water appropriated in any given case is to be measured by the capacity of the ditch or flume at the smallest point; that is, at the point where the least water can be carried through it. *Ophir Silver M. Co. v. Carpenter*, 393.

WHITE PINE.

WHITE PINE MINING LAWS—NECESSARY WORK PER YEAR TO HOLD MINE—
see **MINES**, 2.



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